IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

v.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE APPELLANTS

PETER L. BRIGER
BRIGER & ASSOCIATES
299 Park Avenue
New York, New York 10017
(212) 758-4000

SHELDON S. COHEN
COHEN & URETZ
1775 K Street, N.W.
Washington, D.C. 20006
(202) 293-4740

REED M. WILLIAMS
RONALD L. YOUNG
GRAHAM & JAMES
100 Oceangate, Suite 515
Long Beach, California 90802
(213) 435-4435

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

v.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE APPELLANTS

Opening Statement

Appellants, six Japanese steamship companies (hereinafter referred to as the "Taxpayers") appeal from the decision of the Supreme Court of the State of California (hereinafter referred to as the "California Supreme Court") filed on November 18, 1977, rehearing denied, December 28, 1977. This decision upheld the imposition by Appellees (hereinafter referred to as the "Municipalities") of a personal property tax upon ocean-going cargo containers, owned by the Taxpayers, used exclusively in foreign commerce and having no fixed presence in the territorial limits of California.

In a decision rendered by the Honorable Hampton Hutton for the Superior Court, Los Angeles County (hereinafter referred to as the "Superior Court"), it was determined that the imposition of such tax was repugnant to the Constitution of the United States (hereinafter referred to as the "Constitution") and various treaty obligations of the United States. The Court of Appeal, Second Appellate District, of the State of California (hereinafter referred to as the "Court of Appeal") reversed the decision of the Superior Court on the ground that the Municipalities were not barred by either the Constitution or any of the various treaty obligations of the United States from imposing personal property tax upon the Taxpayers' containers. The California Supreme Court affirmed this decision and adopted the opinion of the Court of Appeal as its own.

The Taxpayers respectfully submit this brief to demonstrate that: (i) this Honorable Court has jurisdiction of the appeal; and (ii) the opinion of the California Supreme Court is erroneous as a matter of law and must be reversed.

Opinions Below

The opinion of the California Supreme Court is reported at 20 Cal. 3d 180, 141 Cal. Rptr. 905, 571 P. 2d 254 (1977). The opinion of the Court of Appeal is reported at 61 Cal. App. 3d 562, 132 Cal. Rptr. 531 (1976). The opinion of the Honorable Hampton Hutton of the Superior Court was not officially reported. (The opinions below are reprinted at App.,[1] pp. 21-24 and 43-64.)

[1] All references to the term "App." herein refer to pages in the Appendix filed herein, pursuant to Rule 40 (1)(e).

Jurisdiction

The jurisdiction of the Court to review the decision below on appeal is conferred by 28 U.S.C. §1257(2) which provides as follows:

> "Final judgments or decrees rendered by the highest court of the state, in which a decision may be had, may be reviewed by the Supreme Court . . . by appeal, where there is drawn into question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

A timely request for appellate review was made to the Court by the Taxpayers. The Notice of Appeal was filed with the California Supreme Court on February 28, 1978. The Taxpayers filed their Jurisdictional Statement with the Court on March 28, 1978. On June 12, 1978, the Court postponed further consideration of the question of jurisdiction until the full briefing and hearing of the case on the merits. The jurisdiction of the Court to review this case is argued at pages 12 to 14 hereof.

Statutory, Constitutional and Treaty Provisions Involved

The relevant statutory, constitutional and treaty provisions involved in this case are set forth at pages 1a through 10a hereof.

Question Presented

The question presented is whether the imposition of personal property taxes on foreign-owned, ocean-going con-

tainers, used exclusively in foreign commerce and present within the territorial limits of the Municipalities for only limited periods of time and continually in transit, is repugnant to the following provisions of the Constitution: (i) Article I, Section 8, Clause 3 (the Commerce Clause); (ii) Article II, Section 2, Clause 2 (the Treaty Power Clause); (iii) Article VI, Clause 2 (the Supremacy Clause); (iv) Article I, Section 10, Clause 3 (the Tonnage Duty Clause); (v) Article I, Section 10, Clause 2 (the Import-Export Clause); (vi) the Fourteenth Amendment, Section 1 (the Due Process Clause) as well as the following treaty obligations or Executive agreements: (i) Chapter I, Article I(a) and Chapter II, Article 2 of the Customs Convention on Containers, 20 U.S.T. 301, T.I.A.S. 6634 (hereinafter referred to as the "Container Convention"); (ii) Articles XI(1) and (4) and Article XXII(2) of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. 2863 (hereinafter referred to as the "FCN Treaty with Japan"); and (iii) Article III, paragraphs 1 and 2 of the General Agreement on Tariffs and Trade, 61 Stat. [5], [6], T.I.A.S. 1700 (hereinafter referred to as the "GATT").

I.

Statement

The Taxpayers are six corporations established and existing under the laws of Japan. (Statement in Lieu of Clerk's and Reporter's Transcripts (hereinafter referred to as the "Statement"), ¶ 15, App. 31.) They are engaged, *inter alia*, in the ocean transport of cargo between Japan and the United States, as well as third countries. (Statement, ¶¶ 5, 6, 16, App. 30-31.) Each of the Taxpayers maintains its principal place of business and commercial domicile in Japan. (Statement, ¶ 15, App. 31.) Commencing in the late 1960's, the Taxpayers began to transport cargo between Japan and the United States by means of ocean-going containers, carried upon vessels specially designed and constructed to carry such containers. (Statement, ¶ 18, App. 31.) The vessels utilized by the Taxpayers were of such a type and design that they could function on a commercially feasible basis only when laden with a complement of containers. *Id.*

The utilization of containers is a recent and important technological advance in the ocean transport of cargo. Aside from reducing the actual cost of transportation through greater efficiency, the use of such containers greatly decreases the risk of damage through theft or fire and thereby decreases the need for police and fire protection at local ports.

All of the vessels of the Taxpayers, on which the subject containers are carried, are registered and maintain their "home port" in Japan. (Statement, ¶ 16, App. 31.) During the tax years 1970, 1971 and 1972[2] the Taxpayers, in connection with their containerized transport of cargo in foreign commerce, used ports located within the Municipalities. (Statement, ¶ 1, App. 29.) The Taxpayers did not maintain on a permanent basis any particular containers within the Municipalities during the periods in issue. (Statement, ¶ 14, App. 31.) The average stay of any of the containers therein at any one time was less than three weeks. (Statement, ¶ 13, App. 31.) None of the con-

[2] Under California law, a property tax year commences on the first day of July of each year. However, the tax is applicable to all property within the taxing jurisdiction on the preceding first day of March, which is commonly referred to as the "lien date". Cal. Rev. and Tax Code, §§401.3 and 2192.

tainers present in the Municipalities on the relevant dates had been present in California for as much as six of the twelve months immediately preceding the aforesaid lien date. (Statement, ¶ 12, App. 31.) The containers passed through the Municipalities as an integral part of the foreign transport of cargo and were used exclusively in foreign commerce. (Statement, ¶ 5, App. 30.) The containers were never used for the intrastate or interstate transportation of cargo. (Statement, ¶ 6, App. 30.)

Pursuant to 19 C.F.R. §10.41a(a)(1),[3] containers are required to be released by the Customs Service without the payment of a customs duty and to be treated as not having entered the United States. The exemption from duty and entry is conditioned upon the undertaking that the containers are not to be used in interstate or intrastate commerce. Such undertaking is secured by the posting with the Customs Service of a bond.

Pursuant to an "average presence" fiction, not authorized by section 201 of the California Revenue and Tax Code or any other statutory provision and contrary to the specific mandate of 18 California Administrative Code §205, relating to the taxable *situs* of movable property, the Taxpayers were considered to have actually maintained a certain fixed number of containers upon a permanent basis within the Municipalities on the lien dates in issue. A personal property tax was imposed on the basis that a portion of the containers were considered to be present within the jurisdiction on a continuous basis.

The tax imposed is a general levy which is used to fund any and all public needs, without regard to the provision of any specific service to the particular Taxpayers

[3] 19 C.F.R. § 10.41a(a)(1) is set forth on page 10a hereof.

herein or the class of persons constituting the shipping industry.[4] The level of property tax is grossly disproportionate to the value of services potentially available to the Taxpayers. By way of example, there is set forth below a list of the various tax agencies entitled to receive a portion of the property tax imposed by one of the Municipalities, as well as the proportion of such tax earmarked as attributable to that taxing agency, all as reflected in the notice of assessment issued to the Taxpayers:[5]

"*Taxing Agency*	*Rate* [%]
Los Angeles	2.5157
County	4.0882
Unified Schools	4.7952
Junior College	.4489
Flood Control	.3552
Water Replenish [sic]	.0012
Water Agencies	.1700
Mosquito Abate [sic]	.0057
Total	12.3801"

[4] The Taxpayers make a number of arguments based upon factors which it is submitted this Court can recognize as a matter of judicial notice. *See, N.L.R.B.* v. *E.C. Atkins & Co.,* 331 U.S. 398, 406, fn.2 (1946). *See also, Colonial Airlines* v. *Jonas,* 202 F.2d 914, 919, fn.1 (2d Cir. 1953); *and United States* v. *Holmes,* 414 F. Supp. 831, fn.3 (D. Md. 1976). The case is unique in several aspects because the decision of the California Supreme Court had a domino effect which precipitated many actions on the part of foreign governments that directly evidence impact upon foreign relations and the significant interest of the Federal Government. Moreover, the economic data cited herein is a matter of public record.

[5] The notice of assessment was submitted by the County of Los Angeles and a representative copy is attached hereto as Exhibit "A".

The foregoing rates are applied, in each instance, to the assessed value of the Taxpayers' property. Ordinarily, the assessed value of the property is equal to 25 percent of the market value of the property.[6]

The published reports relating to revenues (including tax collections) and expenditures of the Municipalities during the years in issue indicate that less than two to three percent of the total revenues of the Municipalities could in any way be considered as providing any potential measure of support, benefit or protection to the Taxpayers herein in terms of police protection and fire protection, road construction and maintenance. (Appendix to Jurisdictional Statement, 36a-47a). Copies of the relevant portions of the Annual Reports published by the Los Angeles Harbor for the years 1970-71 and 1971-72 are attached hereto as Exhibits "B" and "C" respectively.

The expenditures incurred by the Municipalities in the maintenance of the port facilities used by the Taxpayers are recovered through two types of specific charges imposed upon the user of port facilities. First, the owner of the vessel is required to pay a dockage charge for the privilege of mooring the vessel. Second, the owner of cargo passing through the harbor is required to pay a wharfage charge for goods passing over the wharf. These charges are used to pay the costs of the port facility, including the costs of police protection, road service and, in some instances, fire protection. For instance, the Port of Long Beach maintains its own security force and operates its own fireboats. The income of the Harbor Fund at least in the County of Los Angeles during the years in issue has exceeded expenditures incurred in connection with provision of harbor services.

[6] Cal. Rev. and Tax Code, §401.

Instead of using public harbor facilities, incoming vessels may rent their own terminal from the port authority. Four of the Taxpayers rented a terminal from one of the Municipalities. In addition to the rent paid, these Taxpayers were charged a special tax imposed upon the value of their leasehold interests, designated as a "possessory interest tax."

The containers are also subject to indirect taxes imposed upon trucks while they are transported from the port facility to their respective destinations. These taxes include gasoline tax, registration fees with respect to trucks and similar levies intended to cover the cost of road construction and maintenance.[7]

All containers of the Taxpayers have been subjected to full *ad valorem* property taxation in Japan, including those subjected to California property tax by the Municipalities. (Statement, ¶ 22, App. 32.) The Taxpayers timely paid such taxes and no portion thereof has been refunded. (Statement, ¶ 2, 23, App. 30, 32.) Containers, owned or used by United States shipping companies, were never subjected to property taxation in Japan, even though temporarily present in Japan for the receipt or delivery of cargo or awaiting transport by vessel. (Statement, ¶ 25, App. 32.) To eliminate the incidence of multiple taxation upon vessels (including containers used in connection therewith) engaged in foreign commerce, Japan applies the equivalent of a "Home Port" doctrine. (Statement, ¶ 25, App. 32.)

All other governments with which the United States maintains trading relationships have taken steps, through a variety of means, to assure that foreign-owned containers,

[7] *See e.g.*, Cal. Rev. and Tax Code, Part 2 (§§ 7301-8404) and Part 3 (§§ 8601-9335).

used exclusively in foreign commerce and present in the foreign country only for temporary periods of time, are exempt from local property taxation. Some countries, such as Japan, impose property taxes upon the equivalent of a "Home Port" doctrine. Other countries exempt foreign-owned containers, provided that they are present therein for only some limited period during the year. Other countries either totally exempt containers from taxation, do not impose such taxes or provide an exemption for foreign-owned containers provided that a reciprocal exemption is extended by the country of the foreign owner.

On February 17, 1978, representatives of the Government of Japan conferred with the United States Department of State (hereinafter referred to as the "State Department") to express concern over the imposition by California of property taxes upon the containers of the Taxpayers. An *aide memoire* confirming such concern was delivered by the Government of Japan to the State Department on March 27, 1978. (Appendix to Jurisdictional Statement, 50a.)

The imposition of California property tax has also prompted protests from other nations. The Governments of Denmark, France, Finland, the United Kingdom, jointly with the Government of the Netherlands, informed the State Department in a letter dated May 16, 1978, that they shared the concern expressed by the Government of Japan regarding the imposition of personal property tax upon foreign-owned containers. *See,* Exhibit "D" hereto. This letter also stated that proliferation of personal property tax in accordance with the example set by the Municipalities is viewed "with considerable apprehension." The Federal Republic of Germany also submitted a letter to the State Department which expressed concurrence with the views of the Japanese and Netherlands Governments. *See,* Exhibit "E" hereto. On July 25, 1978, the Government of Norway

delivered to the State Department a letter expressing similar concerns. *See,* Exhibit "F" hereto.

The California State Board of Equalization on March 24, 1978, proposed an amendment to California law that would permit imposition of personal property tax upon aircraft owned by foreign persons and used exclusively in foreign commerce. *See,* Exhibit "G" hereto. On June 15, 1978, the Government of Mexico filed a letter with the State Department to protest such action and noted that the abandonment of the principle of reciprocal exemption could immediately lead to taxation of United States-owned aircraft and that no one would stand to gain from such escalation of taxation. *See,* Exhibit "H" hereto. The Federal Republic of Germany filed a similar letter. *See,* Exhibit "I" hereto. Additional letters of protest were filed by the following Governments: Canada, Denmark, France, Japan, the Netherlands, New Zealand, Norway, Sweden and the United Kingdom, copies of which are attached hereto as Exhibits "J" through "P", respectively.

Pursuant to the opinion dated January 31, 1978, of the Oregon Department of Justice, the State of Oregon reversed its position and decided that personal property tax can lawfully be imposed upon ocean-going containers within Oregon. *See,* Exhibit "Q" hereto. Subsequently, the Taxpayers, as well as a number of other foreign shipping companies using port facilities within Multnomah County, Oregon, were required to file personal property tax returns with respect to containers present in the County as of the lien date. Taxes have now been assessed against the Taxpayers by Multnomah County, Oregon, on the basis of the containers actually present therein on the lien date.

When the instant appeal was filed with the Court, the California legislature was considering a bill to exempt

containers from the incidence of personal property tax. On April 17, 1978, the State Department submitted a letter to Governor Jerry Brown supporting the passage of the bill because it would lessen the likelihood of retaliatory taxation measure against United States persons engaged in ocean commerce. *See,* Exhibit "R" hereto. The proposed amendment to exempt containers from property tax has at this time been abandoned.

On June 12, 1978, the European Economic Community Council (hereinafter referred to as the "EEC") decided to study suitable countermeasures to take against non-member states the practices of which are detrimental to the maritime interests of member states. *See,* Exhibit "S" hereto.

II.

This Court Has Jurisdiction to Hear This Appeal

On March 28, 1978, the Taxpayers timely submitted a Jurisdictional Statement to invoke the appellate jurisdiction of the Court. In its order of June 12, 1978, the Court postponed further consideration of the question of jurisdiction until the briefing and hearing of the case on the merits. The Taxpayers respectfully submit that all of the elements required by 28 U.S.C. §1257(2) for the Court to exercise appellate jurisdiction are present in this case, namely:

1. The order of the California Supreme Court on December 28, 1977, denying the Taxpayers' petition for rehearing, is a "final judgment or decree" rendered by the highest court of the State of California in which a decision could be had. *Empresa Siderurgica* v. *County of Merced*, 337 U.S. 154 (1949); *and Market Street R. Co.* v. *Railroad Commission*, 324 U.S. 548, 551 (1945);

2. The decision of the California Supreme Court upholds the validity of a statute of the State of California. The Municipalities have asserted that the instant case involves a provision of the California Constitution and that review thereof is permitted through petition for *certiorari*. Motion to Dismiss or Affirm, p. 2. This contention is erroneous as a matter of record, which reflects that the Taxpayers questioned the imposition of tax pursuant to a state statute.[8] It is clear that, although the California Constitution enables extension by the legislature of taxation and the permissible objects thereof, it is a state statute, not the California Constitution, which authorizes the Municipalities to collect the tax. The California Constitution is not challenged since, in the absence of the statute, the tax could not be collected by the Municipalities;

3. The Taxpayers have argued from the inception of this case that the application of section 201, California Revenue and Taxation Code, in a manner which subjects their containers to property tax, is repugnant to the Constitution and various treaty obligations of the United States. Specifically, the validity of Section 201, California Revenue and Taxation Code, as relates to its imposition of California property tax on the subject containers, was initially called into question with commencement of this action by the Taxpayers (*See,* App., pp. 7, 13 and 19-20). Thereafter, the validity of this statute under the Constitution and treaty obligations of the United States has continually been at issue in this case. This Court has held that the validity of a state statute is sustained within the meaning of 28 U.S.C. §1257 (2) when a state court holds that the state statute applies to a particular set of facts, as against

[8] *See, App.* at 7, 13, and 19-20.

the argument that such an application is unconstitutional. *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971); and

4. The fact that the state statute involved was interpreted and applied by the Municipalities, rather than a state authority, is not relevant to the jurisdiction of this Court. *Empresa Siderurgica, S.A.* v. *County of Merced*, 337 U.S. 154 (1949). The collection of tax by the City of Los Angeles and City of Long Beach involves the same statutory provisions as involved in the case of Los Angeles County. *See, e.g., Parrott & Co.* v. *City and County of San Francisco*, 280 P.2d 881 (Cal. App. 1955).

Decisions sustaining the jurisdiction of this Court to review the decision on appeal are: *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 61 n.3 (1963); *Empresa Siderurgica* v. *County of Merced*, 337 U.S. 154, 156 (1948); *and Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921).

If this Honorable Court is not satisfied that it has jurisdiction on appeal, it is respectfully submitted that this case is nonetheless properly before the Court since the questions presented herein are of substantial Federal import and the papers upon which the appeal is predicated can be considered as a petition for *certiorari*, pursuant to 28 U.S.C. §2301. *Commonwealth of Pennsylvania* v. *City of Philadelphia*, 353 U.S. 230 (1957). It should be noted that the Municipalities have conceded that this case is proper for review pursuant to a petition for *certiorari*. Motion to Dismiss or Affirm, p. 2. Therefore, if the Court concludes that it cannot hear this case as an appeal pursuant to 28 U.S.C. §1257(2), it is prayed that the Court should treat the jurisdictional statement as a petition for *certiorari* and grant such petition because of the importance of the issue involved.

III.

Summary of Argument

The decision of the California Supreme Court, upholding the imposition of personal property tax upon containers used in foreign commerce, gravely and profoundly changes long-standing rules, uniformly adopted on an international level, to exempt such instrumentalities of commerce from multiple local tax burdens. More than 120 years ago, this Court, in recognition of such international practice, adopted the "Home Port" doctrine pursuant to which a vessel engaged in foreign commerce would be subject to tax only in the jurisdiction in which its owner is resident or domiciled. *Hays* v. *Pacific Mail Shipping Co.*, 58 U.S. (17 How.) 596 (1855). The "Home Port" doctrine must be sustained in the instant case because: (i) the apportionment concept, which this Court approved in the case of interstate commerce, is not feasible in foreign commerce; (ii) the foreign trading partners of the United States have relied upon the existence of the "Home Port" doctrine and their interests should not lightly be discarded; and (iii) the doctrine recognizes the importance of uniformity in the international carriage of goods and persons (which is so important to and interconnected with the foreign relations and commerce of the Nation), and has most appropriately reserved the exclusive authority of regulation of the Federal Government in this area.

The application of any law in the United States which affects relations with foreign countries, including those arising under treaty obligations of the United States, cannot ignore the reliance interests of foreign countries. None of our treaty or trading partners has imposed any tax on foreign-owned containers. Other nations uniformly exempt

foreign vessels, ships' gear and other integral parts of the vessel from taxation in their respective jurisdictions on the basis that other nations follow the same or similar practices. This concept is embedded in the "Home Port" doctrine. The Court has recognized the importance of this consideration in *Zenith Radio Corporation* v. *United States*, 98 S.Ct. 244 (1978).

The decision of the California Supreme Court ignores the elements of Federal concern and, if allowed to stand, would produce profound and fundamental changes, in fact, upheavals, upon the foreign relations and commerce of the United States. Because of the elemental nature of the changes that would be effected if the "Home Port" doctrine were not sustained in the case of foreign instruments used exclusively in foreign commerce, the validity of the tax in the instant case must be considered within the context of a number of provisions of the Constitution, including: (i) the Commerce Clause; (ii) the Treaty Power and Supremacy Clauses; (iii) the Prohibition Against Tonnage Duties Clause; (iv) the Import-Export Clause; and (v) the Due Process Clause. The Taxpayers respectfully submit that imposition of personal property tax by the Municipalities is in violation of each of the above-mentioned provisions of the Constitution.

The fundamental objection to imposition of tax by the Municipalities in the instant case arises from the necessity for regulation of foreign commerce by the Federal Government in order to maintain a system of uniformity between nations. Whether under the Commerce, Treaty Power, Supremacy, Tonnage Duties, Import-Export or Due Process Clauses, the Federal Government must be regarded as bearing the final and absolute authority to regulate foreign commerce. These Constitutional provisions ensure

that the Nation will speak with one voice when dealing with foreign nations, and thereby avoid the frictions that would otherwise develop between nations, as well as the states. *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976); *and Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941). The existence of this Federal interest and necessity for Federal regulation is directly relevant to the validity of the tax imposed by the Municipalities under each of the aforementioned provisions of the Constitution.

The necessity for Federal regulation in this area arises out of, and is demonstrated by, the following factors:

1. The entire framework and fabric of the international treatment of instrumentalities of commerce has been the reciprocal exemption of such items from the incidence of local taxation or customs duties. *See, e.g.*, 46 U.S.C. §§121, 141 and 142. Over the years, many of these international rules or conventions have been memorialized in treaties, such as the Container Convention, the various international aviation conventions, the FCN treaties, including the FCN treaty with Japan, and the GATT. Specifically, the Container Convention grants containers temporary admission free of all import duties and import taxes, which are defined to mean "not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation." Container Convention, Ch. I, Art. 1(b). The entry into these treaties by the Federal Government evidences an intention to deal with vessels and other instrumentalities of foreign commerce, as a matter of foreign relations, solely upon the basis of reciprocal exemption from local taxation. As stated in *Jordan* v. *Tashiro*, 278 U.S. 123, 127 (1928), treaties should "be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. . ."

2. In addition to the above-mentioned treaties, the rules of reciprocity are engrained in the laws of the United States. These laws reflect not only the policy of reciprocal exemption for foreign carriers but also a clear Federal intent for uniform regulation in this area. One example of such laws is the Federal excise tax which, since 1790, has been imposed upon the tonnage of vessels entering the territorial waters of the United States, subject to the existence of reciprocal exemptions as provided by treaty or Executive action. 46 U.S.C. §§121, 141 and 142. Thus, even in the absence of treaties, the President is authorized to suspend the application of the excise tax upon vessels of foreign nations upon a reciprocal basis or to impose discriminatory duties against the vessels of foreign nations determined to have imposed discriminatory duties against United States-owned vessels. The net effect of these provisions is to assure parity of treatment of vessels on a reciprocal basis by all nations. A second, and more pertinent, example consists of the customs regulations, which the Federal Government adopted to implement the provisions of the Container Convention to exempt foreign-owned or operated containers, used exclusively in foreign commerce, from "all duties and taxes whatsoever chargeable by reason of importation." Under these regulations, containers are designated as "instruments of international traffic" and upon their arrival at ports within the United States are to be released without: (i) formally being considered as having entered the United States; and (ii) the payment of duty. *See*, 19 C.F.R. §10.41a(a)(1). It is submitted that, if the Federal Government, pursuant to the provisions of an international treaty obligation, as implemented by Federal law and regulations, has taken the position that the containers have not entered the territory of the United States for purposes of the imposition of duty

or other taxes chargeable by reason of importation, the States or local governments cannot, particularly through reliance upon a highly tenuous "average presence" fiction, subject these containers to local property taxation.

3. The action of the Municipalities, as sanctioned by the California Supreme Court, bears upon the Nation as a whole and, unless reversed by the Court, would have the immediate effect of subverting long-established and carefully determined actions taken by the Federal Government to regulate this important and highly sensitive area of foreign relations and commerce. *Zschernig* v. *Miller*, 389 U.S. 429 (1968); *and Belmont* v. *United States*, 301 U.S. 324 (1937). Unless the decision of the California Supreme Court is reversed, the incidence of local property tax upon foreign-owned or operated instrumentalities used exclusively in foreign commerce will proliferate and lead to a pervasive system of foreign retaliation, directed solely against United States flag carriers. This conclusion is supported by a review of the events which have transpired since the final entry of the decision of the California Supreme Court on December 28, 1977, including: (i) the determination by the State of Oregon in January 1978 to adopt the position enunciated by the California Supreme Court; (ii) the proposal by the California State Board of Equalization to subject foreign-owned aircraft to California property tax; and (iii) the abandonment by the California legislature of a bill to exempt containers from property tax in California.

4. These events have prompted the issuance of expressions of concern to the State Department on behalf of at least eight foreign governments, including Denmark, Finland, France, Japan, the Netherlands, Norway, the United Kingdom and the Federal Republic of Germany. The pro-

posal by the California State Board of Equalization to subject aircraft used exclusively in foreign commerce to property taxation has prompted at least eleven foreign governments, including Canada, Denmark, France, Japan, Mexico, the Netherlands, New Zealand, Norway, Sweden, the Federal Republic of Germany and the United Kingdom to issue formal expressions of concern to the State Department. Moreover, on June 12, 1978, the EEC decided to study suitable counter-measures to take against non-member states the practices of which are detrimental to the maritime interests of member states.

5. The action of the Municipalities, as sanctioned by the California Supreme Court, invites retaliation as against all United States-owned instrumentalities of commerce. The State Department in a letter to Governor Jerry Brown of the State of California expressed its concern that the continued imposition of property taxes by local governments of the State of California upon foreign-owned containers used exclusively in foreign commerce would result in the likelihood of retaliatory taxes being imposed upon United States shipping companies. Several foreign nations have directly referred to the possibility of retaliation against United States-owned instrumentalities, such as aircraft, if the principle sustained by the California Supreme Court is extended thereto. More importantly, the laws of the Federal Republic of Germany grant exemption from taxation only upon the basis of reciprocity. The imposition of tax in the Federal Republic of Germany upon United States-owned containers will follow automatically without further legislative action by that Government.

Clearly and properly so, there are numerous areas, including many in the area of foreign commerce, where actions by State or local governments are proper and can be

co-existent with Federal regulation. *Cf. Ray* v. *Atlantic Richfield Co.,* 98 S.Ct. 988 (1978); *and Bob-Lo Excursion Co.* v. *Michigan,* 333 U.S. 28, 35 (1948). In the case of taxation, the Court has noted upon a number of occasions that goods or equipment in interstate commerce must pay their just share of State and local government costs incident to interstate commerce. However, the states may not transfer general tax burdens upon interstate, and more particularly foreign, commerce. *See, Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977); *and Ingels* v. *Morf,* 300 U.S. 290 (1936). *See also, McGoldrick* v. *Gulf Oil Corp.,* 309 U.S. 414 (1939). It is submitted that, by whatever standard may be applied, the containers in question must be regarded as having "paid their own way."

It is customary that, through the imposition of specific wharfage and dockage charges upon the user of port facilities, such as the Taxpayers, the Municipalities recover, at the very least, the cost of all services and facilities provided to the user of containers. Such charges are used to pay all expenditures incurred by the port facility, including police and security protection, road service within the harbor and in many cases fire protection. For instance, the Port of Long Beach maintains its own security force and operates its own fire fighting equipment. The published financial statements of at least Los Angeles County during the years in issue reflects that revenues have exceeded total expenditures incurred for the provision of harbor services.

In addition to the foregoing charges, either directly or indirectly, four of the Taxpayers were required to pay a "possessory interest" tax to the Municipalities based upon the value of their respective leasehold interests in the port facilities.

The published financial reports of the Municipalities further reflect that during the years in issue less than two to three percent of the total revenues of the Municipalities could be considered as providing any potential measure of support, benefit or protection to the Taxpayers through police protection, fire protection or road construction or maintenance. Under the circumstances, there can be no question that the Taxpayers' containers have and do "pay their own way."

It is respectfully submitted that, for the foregoing reasons, the tax, as applied to the Taxpayers' containers is repugnant to the Constitution and the treaty obligations of the United States.

IV.

Argument

A. Foreign Vessels, Aircraft and Integral Parts Thereof Engaged in Foreign Commerce Are Subject to Tax Only in Their Home Port

The Court more than 120 years ago formulated the "Home Port" doctrine as the most appropriate means of eliminating problems of multiple taxation and interference by State or local governments with the uniform regulation of foreign relations and commerce by the Federal Government in the highly sensitive area of international carriage of goods or persons through vessels or other instrumentalities of commerce. *Hays* v. *Pacific Mail Shipping Co.,* 58 U.S. (17 How.) 596 (1855). Under this rule a vessel or other instrumentality of commerce is subject to taxation in its "Home Port." The Court, in the adoption of this doctrine, formally recognized the internationally accepted rule intended to eliminate problems of multiple taxation

upon vessels engaged in commerce in more than one jurisdiction.

The "Home Port" doctrine continues as the most appropriate means of resolving the foreign relations and multiple tax problems inherent in the operation of foreign instrumentalities, used exclusively in foreign commerce, for the following reasons: (i) apportionment is not feasible within the context of foreign commerce; (ii) the approach of the California Supreme Court would constitute a rejection of a long-standing rule relied upon by foreign nations in their commerce with the United States; (iii) it would constitute an unwarranted interference with the responsibility of the Federal Government to regulate foreign relations and policy in the highly sensitive area of international carriage of goods and passengers, where the Federal Government has carefully, through a number of means, taken steps to implement a program of reciprocal exemption from taxation for foreign instrumentalities.

Initially, the "Home Port" doctrine was applied only to ocean-going vessels. It was later extended to vessels engaged in river traffic. *St. Louis* v. *The Ferry Co.,* 78 U.S. (11 Wall.) 423 (1871). In *Ott* v. *Mississippi Valley Barge Line Co.,* 336 U.S. 169 (1949), the Court concluded that, for instrumentalities used solely in interstate commerce, the "Home Port" rule must give way to an apportioned property tax. However, the Court was careful not to abrogate the validity of the "Home Port" rule in the case of instrumentalities used exclusively in foreign commerce. 336 U.S. at 173-174. Even in *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U.S. 18, 23 (1890), the Court was careful to note that it was not applying the apportionment rule to foreign commerce.

The Court in *Ott* noted that, in connection with interstate commerce, the utilization of apportionment largely eliminates the risk of multiple taxation and, hence, any Commerce Clause objection. However, the principle of apportionment cannot be implemented in the case of foreign commerce since there exists no final arbiter comparable to this Court nor any jurisdictional mechanism to require the various treaty and trading partners of the United States to reject their own established patterns for taxing instrumentalities of foreign commerce. *Cf. Standard Oil Company* v. *Peck,* 342 U.S. 382 (1952). In the area of foreign commerce, the "Home Port" doctrine eliminates this flaw inherent in apportionment and is the only viable solution. As noted by the Superior Court in this case:

> "To consider proration of taxes with foreign entities is not practical. There is no tribunal that can adjudicate these rights unless it be the International Court and to invoke its services jurisdiction must be consented to by all parties. For this reason, our Federal Courts have consistently held that vessels which are instrumentalities of foreign commerce and engaged in foreign commerce can be taxed in their home port only." App. at p. 24.

The application of the "Home Port" doctrine to foreign instrumentalities of commerce must be regarded as a factor affecting the relations of the United States with foreign countries. The continued efficacy of this rule is based to a significant extent upon the "reliance interests" of the foreign countries and the effect of such laws upon foreign persons. The "Home Port" doctrine has been in existence for a period in excess of a century. It has been accepted by a multitude of foreign nations, which likewise exempt foreign vessels, ships' gear and other integral parts of the

vessel, from taxation in their respective jurisdictions on the basis that other nations follow the same or similar concepts. The Court has recognized the importance of this consideration in *Zenith Radio Corporation* v. *United States,* 98 S.Ct. 2441 (1978), where it stated:

> ". . . foreign tax systems as well as private expectations thus have been built on the assumption that countervailing duties would not be imposed on nonexcessive remissions of indirect taxes. In light of these substantial reliance interests, the long-standing administrative construction of the statute should not be disturbed except for cogent reasons." 98 S.Ct. at 2449.

It is clear that the regulation of international carriage of goods and passengers by vessel, aircraft or other instrumentalities of commerce, particularly as regards the ingress and egress of foreign vessels, aircraft and other instrumentalities, is an area where the interests of the Federal Government far exceed those of State and local governments. *Ray* v. *Atlantic Richfield Company,* 98 S.Ct. 988 (1978); *and British Airways Board* v. *Port Authority of New York,* 558 F.2d 75 (2d Cir. 1977). Vessels and ship's gear have always been subject to special treatment in that they are treated as a mass of property belonging to the nation in which they are registered even though temporarily located in a foreign port or the high seas. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963); *and United States* v. *Flores,* 289 U.S. 137 (1933).

As will be discussed more completely in the next portion of the brief dealing with the Treaty Power and the Supremacy Clause, the Federal Government has entered into a number of bilateral and multi-lateral conventions intended to provide reciprocal exemption from customs duties and any other taxes imposed upon such instrumentalities. The

Federal Government has also adopted a comprehensive program of implementing laws designed to effectuate this program of reciprocal exemption of foreign vessels, aircraft and other instrumentalities of commerce from local duties or taxes. *See,* 46 U.S.C. §141 *et seq.;* and 19 C.F.R. §10.41a(a)(1).

The necessity for uniform regulation in this area and the continued adherence to the long-standing and universally accepted norms and standards of international conduct concerning such activities, as well as the importance of this question as a matter of foreign relations is eloquently attested to by: (i) the formal letters sent by, or on behalf of, twelve foreign governments to the State Department expressing their concern with respect to the imposition of tax by California upon foreign instrumentalities, used exclusively in foreign commerce; (ii) the letter from the State Department to Governor Brown expressing its concern that the continued application of California property tax to such instrumentalities was likely to result in retaliatory taxes being imposed upon United States carriers; (iii) the Brief of the Solicitor General; and (iv) the June 12, 1978 EEC resolution.

The preservation of the "Home Port" doctrine in the case of the international carriage of goods and passengers is necessary in view of the greater importance of uniformity in foreign commerce than in purely interstate commerce. The necessity for uniformity in this area was aptly expressed by Mr. Justice Johnson in his concurring opinion in *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 222-39. Uniformity cannot be achieved in this instance if local taxation of foreign instrumentalities used exclusively in foreign commerce is permitted to proliferate. In essence, this would permit any State, county, municipality or township to take actions, bearing no relationship to local bene-

fits or services conferred, that are likely: (i) to be construed as action by the United States; and (ii) to subject the Nation as a whole to serious international repercussions or even sanctions. The following question raised by Mr. Justice Miller in *Chy Lung* v. *Freeman,* 92 U.S. 275, 279 (1875) is highly relevant to the instant case:

> "If [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?"

The issue in this case, moreover, is reminiscent of Justice Ellenborough's rhetorical question in *Buchanan* v. *Rucker,* 9 East 192 (K.B. 1803):

> "Can the island of Tobago pass a law to bind the rights of the whole world?"

The exclusive power to regulate foreign affairs enables the Federal Government to deal efficaciously with foreign nations through affirmative acts in order "to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interest." *Perez* v. *Brownell,* 356 U.S. 44, 57 (1958). Moreover, foreign commerce demands uniformity of regulation possible only through exclusive regulation by the Federal Government. *Brown* v. *Maryland,* 25 U.S. (12 Wheat.) 419, 445-449 (1827). *See also, Philadelphia & Southern Mail Steamship Co.* v. *Pennsylvania,* 122 U.S. 326 (1887); *Philadelphia & Reading Railroad Co.* v. *Pennsylvania,* 82 U.S. (15 Wall.) 232 (1873); *Bowman* v. *Chicago & N. Ry. Co.,* 125 U.S. 465 (1888); *and Chy Lung* v. *Freeman,* 92 U.S. 275, 279 (1875).

For these reasons, the "Home Port" doctrine must be sustained.

B. Imposition of the Tax Is Repugnant to Treaty Obligations of the United States and the Supremacy Clause

The Commerce Clause vests in the Congress the plenary power to regulate commerce among the several States, with foreign nations and with the Indian tribes. Once Congress has legislated on the regulation of commerce in these regards, the States, by reason of the Supremacy Clause, are preempted from legislating on the same subject matter in an inconsistent manner. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1 (1824). Similarly, the states are also preempted by the Supremacy Clause from legislating in a manner inconsistent with the letter and spirit of a foreign treaty, entered into by the Executive branch of the Federal Government pursuant to the Treaty power and ratified by a two-thirds vote of the Senate. *Missouri* v. *Holland,* 252 U.S. 416 (1920). Moreover, preemption by the Federal Government is further evidenced by the comprehensive programs of legislative, treaty and Executive action which the Federal Government has taken to assure, on an international basis, the reciprocal exemption of instrumentalities of foreign commerce from local taxation. This program is comprised, in pertinent part, of: (i) the Federal excise tax imposed upon the tonnage of both domestic and foreign vessels entering United States ports, based upon the principle of reciprocal exemption (*See,* 46 U.S.C. §121 *et. seq.*); (ii) the Container Convention and the implementing Customs Regulations contained in 19 C.F.R. §10.41; (iii) the Tariff Act of 1930, §322(a), which exempts instrumentalities of international traffic from duty and entry; (iv) the various aviation treaties and agreements; (v) the FCN treaties; and (vi) the GATT.

The foregoing network of treaties, laws and regulations constitutes a pervasive system of Federal rules carefully

designed to provide for the reciprocal exemption of foreign instrumentalities of commerce from the incidence of customs duties and taxes.

A review of these laws and treaty obligations, as well as their underlying purpose, is sufficient to demonstrate that the area has, because of the significant and sensitive foreign relations ramifications, been preempted by the Federal Government. Moreover, instrumentalities of foreign commerce, such as the containers involved herein, are subject to a series of specific charges, imposed by the relevant local governments, which more than cover the cost of the services provided. Under the circumstances, the interest which the Federal Government has in this area clearly preempts the right of State or local governments to impose taxes on foreign-owned instrumentalities of commerce.

The United States became a party to the Container Convention on March 3, 1969. The Preamble to the Container Convention states that the purpose of the contracting parties is "to develop and facilitate the use of containers in international traffic." This purpose is sought to be achieved through adherence to freedom from taxation as embodied in Chapter II, Article 2 of the Convention as follows:

> "Each of the Contracting Parties shall grant temporary admission free of import duties and import taxes and free of import prohibitions and restrictions, subject to re-exportation and to the other conditions laid down in articles 3 to 6 below, to containers when they are imported loaded, or imported empty to be re-exported loaded. Each Contracting Party shall retain the right to withhold these facilities in the case of containers which are imported on purchase or otherwise taken

into effective possession and control by a person resident or established in its territory; the same applies to containers imported from a country which does not apply the provisions of this Convention."

The terms "import duties" and "import taxes" are defined in Chapter I, Article 1(a) of the Container Convention as follows:

"For the purposes of this Convention:

(a) The term 'import duties and import taxes' shall mean not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation."

The phrase "all duties and taxes whatsoever chargeable by reason of importation" used in the definition of the term "import duties and import taxes" must be given the most liberal scope possible and includes all taxes imposed while containers are in transit. As stated in *Neilson* v. *Johnson*, 279 U.S. 47, 52 (1929):

"[t]reaties are to be liberally construed so as to effect the intention of the parties . . . when a treaty admits of two constructions, one restricting, the other enlarging the rights which may be claimed under it, the more liberal interpretation is to be preferred."

See also, Shank v. *DuPont*, 28 U.S. (3 Peters) 2, 42 (1829); *and, Hauenstein* v. *Lynham*, 100 U.S. 628, 629 (1879). Moreover, treaties must be construed to effectuate and secure the intended benefits of reciprocity. *Jordan* v. *Tashiro*, 278 U.S. 123, 127 (1928).

The rules set forth in the Container Convention have been implemented by the Federal Government through the

issuance of the customs regulations contained in 19 C.F.R. §10.41a(a)1, which provide that containers shall be released by the Customs Service without entry or the payment of duty.

Under the Customs Regulations, it is clear that, provided the containers are used within the limitations set forth in the regulations, the containers are not considered as having entered the United States. Based upon the discussion set forth at pages 45 to 47 hereof, the California property tax levied on the Taxpayers' containers is a general revenue measure that can in no way be said to relate to the recovery of the cost incurred in connection with the passage through the Municipalities of the containers. Such action on the part of the State of California, acting through the Municipalities, is repugnant to the Commerce and Supremacy Clauses of the Constitution. *See, McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940), wherein the Court stated as follows:

"It is evident that the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duty. *See, People* v. *Compagnie Generale Transatlantique*, 107 U.S. 59, 63. The Congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition at ships' stores and shall not become subject to the state taxing power. *The customs regulation prescribing the exemption from state taxation, when applied to the facts of the present case,*

states only what is implicit in the Congressional regulation of commerce presently involved. The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce. Sinnot v. *Davenport,* 22 How. 227; *People* v. *Compagnie Generale Transatlantique, supra,* 63; cf. *Kelly* v. *Washington,* 302 U.S. 1, 9, 10."

309 U.S. at 429. [Emphasis added.]

See also, Epstein v. *Lordi,* 389 U.S. 29 (1967); *and Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964).

The Federal Government has concluded FCN Treaties with 17 foreign governments, which typically contain "nondiscriminatory taxation" provisions. *See,* FCN Treaty with Japan, Article XI(1). The FCN Treaties also contain provisions against the imposition of a tax on income, capital or any other basis in excess of that reasonably allocable to the territory of an FCN Treaty partner. *See,* FCN Treaty with Japan, Article XI(4).

The Taxpayers are subject to full *ad valorem* property taxation in Japan. The imposition of even an apportioned tax upon Taxpayers results in an exaction in excess of one full *ad valorem* tax. Since United States-owned containers are exempt from property taxation in foreign countries, such containers cannot be the subject of more than one *ad valorem* tax apportioned between the states. The effect of this situation is a direct and distinct discrimination against foreign-owned containers, which, unfortunately, is likely to result in direct retaliatory discrimination of an even greater magnitude against United States-owned or operated containers. *See,* Exhibits R and S.

The tax as imposed also exceeds the amount of property reasonably allocable to the Municipalities since, under Federal, as well as state law, the containers are not present therein. Lastly, the FCN Treaty with Japan in Articles IX(2) and XXII(2) provides for extension of the benefits of the Container Convention to the residents of Japan by virtue of the "most-favored-nation" clause.[9] *Santovincenzo* v. *Egan,* 284 U.S. 30 (1931). At all times during the taxable years at issue herein, the United States and other nations were parties to the Container Convention. Thus, the Taxpayers are entitled to treatment in the United States no less favorable than that accorded third countries, which treatment includes the protection afforded under the Container Convention.

The United States, by way of executive agreement, on January 1, 1948, became a signatory to the GATT. At all times relevant to this proceeding Japan was party to the GATT. Article III, paragraphs 1 and 2 and Article V, paragraphs 1 and 2 further reflect the pervasive system of treaties, international agreements, laws and regulations adopted by the United States to deal with this question.

The Municipalities' imposition of property taxes upon the containers herein constitutes, whether directly or indirectly, a tax on the goods imported in those containers. *Cf. Thames & M.M. Ins. Co.* v. *United States,* 237 U.S. 19 (1915) (Federal stamp tax on insurance policies insuring exports against maritime risks held tax on exported goods);

[9] Taxes for the tax years 1970 and 1971 involve periods before the date Japan became a signatory to the Container Convention, May 14, 1971. However, the most-favored-nation provision of the FCN Treaty with Japan affords its nationals rights to the same treatment afforded nationals of any third country. Since the United States was a signatory to the Container Convention during all years in issue, Japan is entitled for all such periods to the benefits of the Container Convention under the FCN Treaty.

United States v. *Hvoslef,* 237 U.S. 1, 17 (1914) (Federal stamp tax on charter parties held tax on exported goods); *and Fairbank* v. *U.S.,* 181 U.S. 283 (1901) (Federal stamp tax on foreign bill of lading held equivalent of a direct tax on the goods themselves). Since the containers are also taxed in Japan, goods imported into the United States bear the burden of this tax also. The imposition of the Municipalities' tax herein may require imported goods to bear two taxes, while domestic goods may bear no tax, or at most, one tax, in violation of the GATT provisions. As such, the application of the Municipalities' property tax to the containers herein is repugnant to the Supremacy Clause and must fall.

The foreign trading and treaty partners of the United States have acted in reliance upon their interpretation and understanding of the Constitution, the laws of the United States and the above-mentioned treaties and Executive agreements, as evidenced by the fact that foreign-owned containers, including United States-owned containers, are not subject to taxation by such foreign trading and treaty partners.

The conduct of the parties to a treaty is highly relevant for purposes of interpreting the pertinent treaty provisions. *Factor* v. *Laubenheimer,* 290 U.S. 276, 294-295 (1933). *See, also, Choctaw Nations* v. *United States,* 318 U.S. 423 (1943). Moreover, as noted by this Court in *Zenith,* such reliance, particularly over a long period of time, must be taken into account.

The above treaties, as implemented and supplemented by the pervasive system of laws and regulations, particularly in the area of customs regulations, excise duties on the tonnage of vessels entering the United States and the various laws applicable to vessels and aircraft, constitute a direct prohibition on the imposition by Municipalities of

property tax on Taxpayers' containers. The treaties, as well as the various United States laws considered herein, constitute an express or implied declaration of the dominant Federal interest in the area so as to preclude enforcement of state laws touching upon the same matters. *See, Ray* v. *Atlantic Richfield Company,* 98 S.Ct. 988 (1978). *See also, Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148 (1941). Moreover, the treaties and United States laws and regulations further reflect an interest in uniformity in matters affecting foreign commerce. *See, Cooley* v. *Board of Wardens of the Port of Philadelphia,* 53 U.S. (12 How.) 299, 319 (1852).

The authority to regulate and tax foreign commerce should, in this unique and highly sensitive area, therefore, be left exclusively to the Federal Government.

C. Imposition of the Tax Is Repugnant to the Prohibition Against Tonnage Duties Clause

The Prohibition Against Tonnage Duties Clause is intended to prevent taxation of imports and exports through the subterfuge of the imposition of a State or local tax upon the vessels themselves. *Steamship Co.* v. *Portwardens,* 73 U.S. (6 Wall.) 31, 35 (1867); *and Packet Co.* v. *Keokuk,* 95 U.S. 80 (1876). Although the prohibition is against "tonnage duties," this term has been defined to include all types of taxes which do not bear a relationship to specific benefits conferred. *Clyde Mallory Lines* v. *Alabama,* 296 U.S. 261, 265-266 (1935). *See also, Steamship Co.* v. *Portwardens,* 73 U.S. (6 Wall.) 31 (1867). The containers in the instant case are instrumentalities of commerce in their own right and also constitute an integral part of the vessels which transport them. Therefore, on either ground, containers are embraced within the Constitutional prohibition against a "duty of tonnage," and,

consequently, the tax imposed by the Municipalities is repugnant thereto.

A general tax levy imposed upon the property of all citizens, including vessels without distinction, is prohibited under the Tonnage Duty Clause. In *Steamship Co.* v. *Portwardens,* the Court invalidated a tax which was imposed without regard to use of services. There can be no question that a tax imposed upon a vessel, for the general benefit of a community, as distinct from services rendered for the vessel, is prohibited. The services rendered for the containers in this case are the subject of various specific charges, as noted above, including wharfage charges and docking charges. Various other charges and taxes are imposed upon the owners of trucks upon which the containers are transported. These charges or taxes are in the nature of compensating levies that bear some relationship to services rendered by the Municipalities. However, the tax levied by the Municipalities herein is used to finance the other operations of the Municipalities, principally public welfare related costs, which cannot be said in any proper manner to provide any service or benefit for the Taxpayers' containers.

The containers fall within the scope of the protection afforded by the Constitution to vessels and constitute a significant technological advance in the ocean transport of cargo. The manner in which the containers and the vessels that carry them have been designed and constructed makes it clear that the containers are an integral part of the vessels. In effect, a container is a portion of the vessel that allows it to assume amphibious characteristics. To exclude containers from the protection against tonnage duties would clearly discriminate against containers, as compared to more traditional instrumentalities of foreign commerce, in a manner contrary to the admonition of Mr. Justice Frank-

furter in *Northwest Airlines Inc.* v. *Minnesota,* 322 U.S. 292, 300 (1943), wherein he cautioned against the fixing of rules which did not permit continuing technological developments to be taken into account. Moreover, containers are specifically recognized as instrumentalities of commerce in their own right under United States law. 19 C.F.R. §10.41.

The exclusion of containers from the umbrella of protection granted to vessels would constitute an unwarranted distinction between vessels and an integral part thereof. Ocean-going containers are an integral part of the vessel upon which they are transported. *See, Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35, 53 (2d Cir. 1976); and *Leathers Best, Inc.* v. *S.S. Mormaclynx,* 451 F.2d 800, 815 (2d Cir. 1971). The principal advantage that has accrued from the development of containerized carriage of cargo in ocean shipping is the reduction of cost of imports and exports. This benefit should not be undermined by the imposition of local taxes which: (i) are totally disproportionate to the benefits or services provided by the taxing jurisdiction; and (ii) are levied upon an integral part of a vessel.

D. Imposition of the Tax Is Repugnant to the Import-Export Clause

Under the Import-Export Clause, the States may not impose a tax related to goods moving in import or export commerce, except to the extent that the tax is intended to allow the states to recover their expenditures in respect of inspection or other specifically related functions. Products moving in the mainstream of import or export transit are entitled to the protection of the Import-Export Clause, regardless of the name by which the tax is designated or its object. Moreover, the Import-Export Clause precludes application of tax upon the instrumentality in which the

imports and exports move in the mainstream of commerce if the tax either: (i) affects any of the policies underlying adoption of the Import-Export Clause; or (ii) constitutes a transit fee. The personal property tax imposed upon ocean-going containers in the instant case, carrying goods in the import-export trade, falls specifically within the prohibition of Article I, Section 10 of the Constitution and is repugnant thereto.

1. *The Import-Export Clause Precludes Taxation of Instrumentalities In Which Imports and Exports Are Transported*

In *Michelin Tire Corporation* v. *Wages,* 423 U.S. 276 (1976) and *Department of Revenue* v. *Association of Washington Stevedoring Companies,* 98 S.Ct. 1388 (1978), the Court concluded that the Import-Export Clause does not embody an absolute test and that the validity of State or local regulations must be considered within the context of the purposes sought to be achieved through its incorporation in the Constitution as well as the practical effect of the tax imposed upon imports and exports. These purposes are as follows:

> "The Framers of the Constitution thus sought to alleviate three main concerns. . .: The Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically."
>
> *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276, 285-86 [Footnotes omitted].

The Court stated that any tax having an impact upon imports or exports, which contravenes the policies sought to be achieved, is an impermissible "impost or duty."

The tax in the instant case: (i) clearly infringes upon and restrains the power of the Federal Government to conduct foreign policy; (ii) disrupts harmony between the states; and (iii) interferes with the free flow of goods through the States. Unlike the circumstances in *Michelin* and *Washington Stevedoring,* the local tax imposed in the instant case produces an immediate and serious impact upon the foreign relations, policy and commerce of the United States. *Michelin* did not involve a question of local taxation interfering with the right of the Federal Government to regulate foreign policy. The taxpayer therein was a New York corporation and the imported goods had come to rest in the taxing jurisdiction. Moreover, the tax in *Washington Stevedoring* did not usurp the exclusive power of the Federal Government to regulate foreign relations since the object of the tax was a local business, conducted entirely within the State of Washington.

As contrasted with *Michelin* and *Washington Stevedoring,* the activity involved herein is the foreign transport of cargo and the object of the tax, foreign-owned ocean-going containers, are an integral part of a foreign vessel and part of the ship's gear. *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35, 53 (2d Cir. 1976); *and Leathers Best, Inc.* v. *S.S. Mormaclynx,* 451 F.2d 800, 815 (2d Cir. 1971). Trade conducted through vessels constitutes an important aspect of the foreign relations of the United States with

other nations, a point which the Framers of the Constitution explicitly recognized.

The impact on the foreign relations of the United States of the imposition of this tax on the Taxpayers' containers has been reviewed above in detail.

If the authority of the Federal Government in this area must be shared with local governmental units, the foreign governments would be required to deal with a multitude of inferior sovereigns. Within the context of the effect upon the international carriage of goods and passengers, clearly such a result is contrary to the Constitution and totally unworkable within the framework of the carefully established separation of powers between the Federal Government and the States. *See, Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 228-229 (1824). There can be no question that the tax imposed by the Municipalities contravenes the first policy consideration enunciated by the Court in that it usurps the powers reserved to the Federal Government with respect to the regulation of foreign policy.

2. *The Tax Imposed By the Municipalities Constitutes a Transit Fee*

The tax in the instant case also violates the third policy consideration enunciated in *Michelin* in that, if the tax were permitted to be imposed, it would impair the free flow of goods. The Court stated in *Michelin* that nondiscriminatory property taxes imposed upon property may be sustained to the extent necessary to compensate the state for benefits rendered. The Municipalities in this case interpret this language as a broad license to tax all goods and objects moving through a state to the same extent as property permanently resting therein. In fact, the tax imposed by the Municipalities attaches at the moment of entry of the containers into the jurisdiction, without any regard to, or

consideration of, the services rendered or made available by the Municipalities. As reviewed hereinafter, the tax imposed by the Municipalities is void of any relationship to services rendered to the containers.

The Court in *Michelin* expressed its concern as to the possible risk of multiple taxation that might arise in transit in the following statement:

> "Finally, nondiscriminatory *ad valorem* property taxes do not interfere with the free flow of imported goods among the States, as did the exactions of States under the Articles of Confederation directed solely at imported goods. *Indeed, importers of goods destined for inland states can easily avoid even those taxes in today's world. Modern transportation methods such as air freight and containerized packaging. . . , enable importation directly into the inland states.*
>
> * * *
>
> An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States. In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State. *A nondiscriminatory ad valorem property tax obviously stands on a different footing, and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.*"
>
> 423 U.S. 276 at 288-90. [Emphasis added; footnotes omitted.]

The distinction between a proper exaction levied for purposes of recovering expenses incurred in connection with services extended to vessels and a mere transit fee was established in *Packet Co.* v. *Keokuk,* 95 U.S. 80, 84-5 (1877). The rationale enunciated in *Packet Co.* requires establishment of a reasonable relationship between the services rendered and a service which is rendered to the class of persons using such services. *See, Massachusetts* v. *United States,* 98 S.Ct. 1153 (1978); *and Washington Stevedoring,* 98 S.Ct. 1388 (1978). In *Massachusetts* v. *United States,* the Court reiterated its acceptance of the rationale set forth in *Packet Co.* However, Mr. Justice Rehnquist and Mr. Chief Justice Burger jointly dissented from the majority opinion on the grounds that the complainant had not been given an opportunity to establish the excessive nature of the tax involved therein.[10] In *Washington Stevedoring,* the Court again reiterated acceptance of the reasonable relationship test. However, Mr. Justice Powell dissented on the basis of the limitation imposed by the majority of the Court that the tax must be imposed upon the goods themselves, commenting that the limitation constituted resurrection of the direct-indirect dichotomy rejected in *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977).[11] The test enunciated by Mr. Justice Powell is

[10] If the Court determines that any of the evidence upon which any of the arguments made herein is not cognizable by the Court and further determines that any of this data is necessary in light of the recent decisions of this Court in *Complete Auto, Washington Stevedoring, Zenith* or *Massachusetts* v. *United States,* which were decided by this Court after the decision of the Superior Court herein, the Taxpayers request that this case be remanded to the Superior Court in order that the parties may formally introduce the pertinent evidence.

[11] The tax imposed upon the containers is an indirect tax falling upon the goods. *Cf. Thames & M.M. Ins. Co.* v. *U.S.,* 237 U.S. 19 (1915); *and Fairbank* v. *United States,* 181 U.S. 283 (1901). If the tax is not imposed upon the goods, and is considered to be imposed upon the vessel, then it is prohibited under the Tonnage Duties Clause.

based upon an economic analysis—does the tax bear a reasonable relationship to the benefits conferred?

The answer to that question in the instant case is that there is no relationship between the tax and the services rendered. The type of exaction which could be sustained under such a test is a wharfage or docking fee, specifically imposed to compensate the state for a service rendered. However, the tax in the instant case, as a general levy used to fund all public services rendered without distinction as to the recipient thereof, is not the type of tax that is permissible. The tax is used not to repay for special property usage, as in *Packet Co.* and *Massachusetts* v. *United States,* but, rather, for such items as school funding, mosquito abatement and any other general need without limitation. Moreover, the tax is measured by the value of the containers, a criterion which is wholly void of any relationship to the use of services. In practical terms, owners of older containers pay lesser tax even though the same services are used. Clearly a tax which has the scope of the exaction demanded by the Municipalities, as applied in the manner discussed herein, transcends the rationale of "making the imported goods pay their own way." Consequently, it is submitted that the decision of the California Supreme Court must be reversed.

Lastly, the Court in *Michelin* noted that modern means of transport, such as containerization, could be used to avoid multiple taxation as goods move through the country. The Court thereby recognized that containers could not be subject to local taxation since the economic effect thereof would be a burden on commerce. The California Supreme Court disregarded this admonition.

For the above reasons, the imposition of tax by the Municipalities is repugnant to the Import-Export Clause.

E. Imposition of the Tax Upon Ocean-Going Containers Violates Traditional Commerce Clause Considerations

The Court has held, on numerous occasions, that interstate commerce may be required to "pay its own way", without violating considerations underlying the Commerce Clause. In these cases, the tax must be: (i) applied to activity or property with substantial nexus to the state; (ii) fairly apportioned; (iii) related to services provided by the state; and (iv) applied in a nondiscriminatory manner. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). In the event this analysis were to be extended to foreign commerce, it is submitted that the tax imposed is repugnant to the Commerce Clause since, under the particular circumstances involved, it violates each of the abovementioned criteria.

a. The Property of the Taxpayers Did Not Satisfy the Presence Test Imposed by Federal and State Law

In *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1943), the Court held that: (i) movable property used *in interstate commerce* may be considered to have a sufficient nexus with the state if such property repeatedly enters the jurisdiction; and (ii) a sufficient nexus exists if different items of movable property used *in interstate commerce* continually enter the jurisdiction. However, the *Braniff* case differs from the instant one since it dealt with property engaged exclusively in commerce in the United States. In this case, it is clear that, under Federal law, the Taxpayers' containers cannot be considered to have entered the United States. *See*, 19 C.F.R. §10.41a(a)(1). If the containers cannot be considered to have entered into commerce in the United States for purposes of Federal law, they cannot be considered present in California for purposes of the imposition of California property tax. *Cf. McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414, 429 (1939).

Moreover, the containers did not satisfy the actual presence test of Section 205 of the California Administrative Code, which requires that movable property, other than vessels, must have a *situs* within the taxing jurisdiction for a period equal to at least six months. Thus, if the containers are considered not to constitute vessels, the tax violates the basic regulation governing imposition of the tax.

Under the circumstances, since the containers did not enter the United States and were not in California for periods in excess of six months, the Taxpayers' containers cannot be regarded as having moved into that mass of property subject to California property taxation.

b. The Tax Is Not Related to Services Rendered

The Court in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), made reference to *Ingels* v. *Morf*, 300 U.S. 290 (1936), which describes the relationship that must be established between the tax and the services rendered as follows:

> "[t]o justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear that it is *demanded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power* . . . This may appear from the statute itself, . . . or from the use of the money collected, to defray such expense."
>
> 300 U.S. at 294-95. [Emphasis added, citations omitted.]

The lack of relationship in this case is obvious from a mere examination of the structure of the tax. As was recently noted in *Commonwealth of Massachusetts* v. *United States,* 98 S.Ct. 1153, 1165 (1978), the charge must be "structured to compensate the government for the benefit conferred." For instance, in *Interstate Transit, Inc.* v. *Lindsey,* 283 U.S. 183 (1931), the Court invalidated a tax intended to compensate the state for road use based upon the carrier's seating capacity. In *Sprout* v. *South Bend,* 277 U.S. 163 (1928), the Court invalidated a tax to compensate the state for road use based upon the amount of gasoline in the carrier's gas tank.

The tax imposed by the Municipalities is wholly void of any relationship to services rendered by the Municipalities. The structure of the tax is such that the tax burden falls upon the value of property, regardless of the use of services. The newer the container, the greater its value and, therefore, the amount of tax due. Thus, the tax paid is a function not of the services rendered or necessitated but, rather, the age and value of the container. In effect, the more efficient the taxpayer, the newer its equipment, the greater will be the tax levy. By the same token, lesser tax will be due with respect to older and more dilapidated containers. Although this rule may have virtue in terms of spreading the tax burden upon those most able to pay, it has no precedent in traditional Commerce Clause jurisprudence as bearing a proper relationship to the services utilized, particularly in the case of foreign instrumentalities used exclusively in foreign commerce.

More significantly, it must be recognized that the containers in the instant case pay their own way without application of the personal property tax. The wharfage and dockage charges adequately compensate the Municipalities for use of harbors. The taxes imposed upon gasoline as well as registration taxes, compensate the Municipalities for use of highways and protection afforded while in transit through the state. The imposition of an additional levy, admittedly for purposes of funding schools, controlling mosquitos and generating welfare funds, transcends the limits of making the containers pay their own way. The personal property tax is, in reality, nothing more than an attempt to make the containers pay for the way of others.

c. *The Tax is Not Fairly Apportioned*

For the reasons discussed at page 24 hereof, due to the absence of an arbiter such as this Court, the tax imposed by the Municipalities cannot be fairly apportioned.

d. *The Tax is Applied in a Discriminatory Manner*

The application of an apportioned tax to foreign instrumentalities of commerce, while foreign countries exempt United States-owned containers, implicitly effectuates cost increases upon utilization of foreign-owned containers. The exemption of foreign-owned instrumentalities of commerce from local taxation in foreign countries is virtually universal in its application. Against this background, the tax imposed by the Municipalities suffers from the same infirmities recognized in *Moorman Manufacturing Co.* v. *Blair,* 98 S.Ct. 2340, 2356 (1978) (dissenting opinion):

> "Forty-four of the 45 States, other than Iowa, that impose a corporate income tax utilize a similar three-factor apportionment formula. Since Iowa's formula inevitably discriminates against out-of-state sellers, and since it has not been justified on any fiscal or administrative basis, I would hold it invalid under the Commerce Clause."

The uniformity of exemption established as a matter of international law would be severely disrupted if the action of the Municipalities is sustained by the Court.

For these reasons, the tax imposed by the Municipalities is repugnant to the Commerce Clause.

F. The Tax Is Repugnant to the Due Process Clause

Under the Due Process Clause, any local tax which is imposed must be based upon the situs of income producing activity or property and bear a reasonable relationship to the extent of the activity within the taxing jurisdiction. *See, General Motors* v. *District of Columbia,* 380 U.S. 553, 561 (1965); *and Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435 (1940).

In the context of property taxation, "due process" requires *situs* of the property within the taxing jurisdiction. *See, e.g., Braniff Airways, Inc.* v. *Nebraska State Board of Equalization and Assessment,* 347 U.S. 590, 598-599 (1947). The tax imposed is based upon an apportionment made pursuant to an "average presence" fiction that is authorized neither by Federal law, nor by the relevant California law. Under the laws of the United States governing the entry of imported articles of any type into the flow of commerce within the United States, the containers of the Taxpayers were not considered to have entered the United States. 19 C.F.R. §10.41(a)(1). Moreover, Section 205, Title 18, California Administrative Code provides that, before a specific item of movable property, other than vessels, will be considered to have a taxable *situs* in the taxing jurisdiction, it must be present therein for six of the twelve months preceding the lien date. None of the containers taxed had been in the State for as long as six months in the twelve months preceding the lien date. The statute is an implicit rejection by the California Legisla-

ture of the average presence test sanctioned in *Braniff.* Thus, if the containers herein are considered not to constitute vessels, the tax imposed by the Municipalities violates the basic regulation governing imposition of the tax.[12]

The Municipalities have attempted to justify the tax imposed on the basis of police and fire protection and road usage afforded to the property of the Taxpayers. This justification clearly falls outside of the limitations described in *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435 (1940). The published reports relating to the revenues and expenditures of the Municipalities indicate that less than two to three percent of the funds collected generally from property taxes are devoted to police and fire protection and road construction and maintenance. *See,* Appendix to Jurisdictional Statement, 36a-47a. Moreover, it is clear that, the Municipalities exact a sufficient and adequate *quid pro quo* for services rendered, through various specific levies charged for all services rendered.

The imposition of a tax that bears little or no relationship to the benefit provided is clearly repugnant to the Constitutional requirement of due process. Therefore, the decision of the California Supreme Court sustaining such a tax must be reversed.

---

[12] It is submitted that the containers are an integral part of the vessels themselves. As an integral part of the vessels themselves, the containers were exempt from taxation under the California Constitution as it existed during the taxable years in issue herein. Cal. Const., Art. 13, §4 (1932), repealed in 1974. At that time, the California Constitution provided that vessels registered in California could be subjected to personal property tax. This provision implicitly recognized the exemption of foreign registered vessels. The California Constitution as amended in 1974 extends the exemption to all vessels in the state (in excess of 50,000 tons) engaged in transportation of freight or passengers.

CONCLUSION

The decision of the California Supreme Court, sustaining the imposition of personal property tax upon containers used in foreign commerce and present within the territorial limits of the Municipalities for only temporary periods as part of an international voyage, is contrary to the Commerce, Supremacy, Treaty Power, Tonnage Duties, Import-Export and Due Process Clauses of the Constitution. The decision of the California Supreme Court constitutes a significant interference with the foreign relations of the United States and disturbs the existing harmony in the shipping industry based upon rules of reciprocity. For these reasons, the Taxpayers respectfully request that the decision of the California Supreme Court be reversed.

Respectfully submitted,

Peter L. Briger
Briger & Associates
299 Park Avenue
New York, New York 10017
(212) 758-4000

Sheldon S. Cohen
Cohen & Uretz
1775 K Street, N.W.
Washington, D.C. 20006
(202) 293-4740

Reed M. Williams
Ronald L. Young
Graham & James
100 Oceangate, Suite 515
Long Beach, California 90802
(213) 435-4435

Counsel for Appellants

APPENDIX

APPENDIX

Statutory, Constitutional and Treaty Provisions Involved

A. *Cal. Rev. and Tax Code, Section 201*

"All property in this State, *not exempt under the laws of the United States* or of this State, is subject to taxation under this Code."

(Emphasis added.)
59 West's Annotated California Codes 215 (1970).

B. *18 Cal. Ad. Code, Section 205*

"(a) General. Movable Property is *all* property which is intended to be, and is, moved from time to time from one location to another . . .

Movable property has situs where located on the lien date if it has been in the county for more than six of the twelve months immediately preceding the lien date and if it is to remain in or be returned to the county for any substantial period during the twelve months immediately succeeding the lien date . . .

Property which does not have situs where located on the lien date pursuant to the previous paragraph has situs at the location where it is normally returned between uses or, *if there is no such location, at the principal place of business of the owner.*"

(Emphasis added.)

C. *Constitutional Provisions*

1. *Article I, Section 10, Clause 2:*

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws; . . ."

2. *Article I, Section 10, Clause 3:*

"No State shall, without the Consent of Congress, lay any Duty of Tonnage; . . ."

3. *Article I, Section 8, Clause 3:*

"The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

4. *Article II, Section 2, Clause 2:*

"[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . ."

5. *Article VI, Clause 2:*

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

6. *Amendment XIV, Section 1:*

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

D. *Treaty Provisions*

1. *The Customs Convention on Containers,* 20 U.S.T. 301, T.I.A.S. 6634:

"Chapter I, Article 1(a):

For purposes of this Convention:

(a) The term 'import duties and import taxes' shall mean not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation.

Chapter II, Article 2:

Each of the Contracting Parties shall grant temporary admission free of import duties and import taxes and free of import prohibitions and restrictions, subject to re-exportation and to the other conditions laid down in articles 3 to 6 below, to containers when they are imported loaded, or imported empty to be re-exported. Each Contracting Party shall retain the right to withhold these facilities in the case of containers which are imported on purchase or otherwise taken into effective possession and control by a person resident or established in its territory; the same applies to containers imported from a country which does not apply the provisions of this Convention."

2. *The Treaty of Friendship, Commerce and Navigation Between Japan and the United States,* 4 U.S.T. 2063, T.I.A.S. 2863:

"Article XI(1):

Nationals of either party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade . . . within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions or any other object, or to requirements with respect to the levy or collection thereof, more burdensome than those borne by nationals and companies of such other party.

Article XI(4):

In the case of companies of either Party engaged in trade or gainful pursuit within the territories of the other Party, and in the case of nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party but not resident therein, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. . . .

Article XXII(2):

The term 'most-favored-nation treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies,

products, vessels or other objects, as the case may be, of any third country."

3. *The General Agreement on Tariffs and Trade,* 61 Stat. [5], [6], T.I.A.S. 1700:

"Article III, Paragraphs (1) and (2):

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic products.

The products of the territory of any contracting party imported into the territory of any contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly, to like domestic products."

E. Provisions of United States Code

1. 46 U.S.C. § 121

§ 121. Amount of tonnage duties

Upon vessels which shall be entered in the United States from any foreign port or place there shall be paid duties as follows: On vessels built within the United States but belonging wholly or in part to subjects of foreign powers, at the rate of thirty cents per ton; on other vessels not of the United States, at the rate of fifty cents per ton, and any

vessel any officer of which shall not be a citizen of the United States shall pay a tax of fifty cents per ton.

A tonnage duty of 2 cents per ton, not to exceed in the aggregate 10 cents per ton in any one year, is imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the Caribbean Sea, or Newfoundland, and a duty of 6 cents per ton, not to exceed 30 cents per ton per annum, is imposed at each entry on all vessels which shall be entered in any port of the United States from any other foreign port, not, however, to include vessels in distress or not engaged in trade.

Upon every vessel not of the United States, which shall be entered in one district from another district, having on board goods, wares, or merchandise taken in one district to be delivered in another district, duties shall be paid at the rate of 50 cents per ton: *Provided,* That no such duty shall be required where a vessel owned by citizens of the United States, but not a vessel of the United States, after entering an American port, shall, before leaving the same, be registered as a vessel of the United States. On all foreign vessels which shall be entered in the United States from any foreign port or place, to and with which vessels of the United States are not ordinarily permitted to enter and trade, there shall be paid a duty at the rate of $2 per ton; and none of the duties on tonnage above mentioned shall be levied on the vessels of any foreign nation if the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nations, so far as they operate to the disadvantage of the United States, have been abolished. Any rights or priv-

ileges acquired by any foreign nation under the laws and treaties of the United States relative to the duty of tonnage on vessels shall not be impaired; and any vessel any officer of which shall not be a citizen of the United States shall pay a tax of 50 cents per ton.

2. 46 U.S.C. § 128

§ 128. Light money

A duty of 50 cents per ton, to be denominated "light money," shall be levied and collected on all vessels not of the United States, which may enter the ports of the United States. Such light money shall be levied and collected in the same manner and under the same regulations as the tonnage duties: *Provided,* That no such duty shall be required where a vessel owned by citizens of the United States, but not a vessel of the United States, after entering an American port, shall, before leaving the same, be registered as a vessel of the United States.

3. 46 U.S.C. § 135

§ 135. Rights under treaties preserved

Nothing contained in this chapter shall be deemed in anywise to impair any rights and privileges which have been or may be acquired by any foreign nation under the laws and treaties of the United States relative to the duty on tonnage of vessels, or any other duty on vessels.

4. 46 U.S.C. § 141

§ 141. Suspension by President

Upon satisfactory proof being given to the President, by the government of any foreign nation, that no discriminat-

ing duties of tonnage or imposts are imposed or levied in the ports of such nation upon vessels wholly belonging to citizens of the United States, or upon the produce, manufactures, or merchandise imported in the same from the United States or from any foreign country, the President may issue his proclamation, declaring that the foreign discriminating duties of tonnage and impost within the United States are suspended or discontinued, so far as respects the vessels of such foreign nation, and the produce, manufactures, or merchandise imported into the United States from such foreign nation, or from any other foreign country; the suspension to take effect from the time of such notification being given to the President, and to continue so long as the reciprocal exemption of vessels, belonging to citizens of the United States, and their cargoes, shall be continued, and no longer: *Provided,* That the President is authorized to suspend in part the operation of sections 121 and 146 of this title so that foreign vessels from a country imposing partial discriminating tonnage duties upon American vessels, or partial discriminating import duties upon American merchandise, may enjoy in our ports the identical privileges which the same class of American vessels and merchandise may enjoy in said foreign country.

5. 46 U.S.C. § 142

§ 142. Retaliatory suspension of commercial privileges to foreign vessels

Whenever any foreign country whose vessels have been placed on the same footing in the ports of the United States as American vessels (the coastwise trade excepted) shall deny to any vessels of the United States any of the commercial privileges accorded to national vessels in the har-

bors, ports, or waters of such foreign country, the President, on receiving satisfactory information of the continuance of such discriminations against any vessels of the United States, is authorized to issue his proclamation excluding, on and after such time as he may indicate, from the exercise of such commercial privileges in the ports of the United States as are denied to American vessels in the ports of such foreign country, all vessels of such foreign country of a similar character to the vessels of the United States thus discriminated against, and suspending such concessions previously granted to the vessels of such country; and on and after the date named in such proclamation for it to take effect, if the master, officer, or agent of any vessel of such foreign country excluded by said proclamation from the exercise of any commercial privileges shall do any act prohibited by said proclamation in the ports, harbors, or waters of the United States for or on account of such vessel, such vessel, and its rigging, tackle, furniture, and boats, and all the goods on board, shall be liable to seizure and to forfeiture to the United States; and any person opposing any officer of the United States in the enforcement of this section, or aiding and abetting any other person in such opposition, shall forfeit $800, and shall be guilty of a misdemeanor, and, upon conviction, shall be liable to imprisonment for a term not exceeding two years.

6. 46 U.S.C. § 146

§ 146. Discriminating duty on merchandise imported in foreign vessels

A discriminating duty of 10 per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, and merchandise which

Appendix

shall be imported on vessels not of the United States; but this discriminating duty shall not apply to goods, wares, and merchandise which shall be imported in vessels not of the United States, entitled by treaty or any act of Congress, to be entered in the ports of the United States on payment of the same duties as shall then be paid on goods, wares, and merchandise imported in vessels of the United States, nor to goods wares, and merchandise imported in a vessel owned by citizens of the United States, but not a vessel of the United States, if such vessel, after entering an American port, shall before leaving the same be registered as a vessel of the United States.

F. Provisions of the Code of Federal Regulations
19 C.F.R. § 1041a

§10.41a Lift vans, cargo vans, shipping tanks, skids, pallets, and similar instruments of international traffic; repair components.

(a)(1) Lift vans, cargo vans, shipping tanks, skids, pallets, caul boards, and cores for textile fabrics, arriving (whether loaded or empty) in use or to be used in the shipment of merchandise in international traffic are hereby designated as "instruments of international traffic" within the meaning of section 322(a), Tariff Act of 1930, as amended. The Commissioner of Customs is authorized to designate as instruments of international traffic, in decisions to be published in the weekly Customs Bulletin, such additional articles or classes of articles as he shall find should be so designated. Such instruments may be released without entry or the payment of duty, subject to the provisions of this section.

Exhibit A

(Notice of Assessment of Los Angeles County)

ASSESSMENT NUMBER	BILL NUMBER
P8027 3025220000	45203625

MAIL EARLY—AVOID PENALTY

YAMASHITA SHINNIHON STEAMSHIP

210 W 7 ST
LOS ANGELES CALIF 90014
0014

Make Check Payable to:
L.A. COUNTY TAX COLLECTOR

TOTAL TAX	25111	49
6% Penalty After Aug. 31, 1971		
Collection Costs		
Additional Penalties		
Total After Penalties		

THIS BILL IS NOW DUE AND PAYABLE

Enter your Social Security, IRS, or Federal Employer's Number in box below.

– –

004520362500251114900266181724490000

26618 17 1506 68

COUNTY OF LOS ANGELES HAROLD J. OSTLY TAX COLLECTOR
225 N. Hill Street, Los Angeles, California 90012
Phone: 625-3611, Ext. 64575

UNSECURED PROPERTY TAX BILL
for Fiscal Year July 1, 1971 to June 30, 1972
(See #12 on reverse side)

YAMASHITA SHINNIHON STEAMSHIP
CO LTD
210 W 7 ST
LOS ANGELES CALIF 90014

CODE: 0014

7440 009 900

SITUS OR LOCATION:
1466 WILMINGTON SAN PEDRO RD
SAN PEDRO CALIF

PROPERTY DESCRIPTION

ASSESSMENT NUMBER	INDEX NUMBER	BILL NUMBER
P8027 3025220000	95003313	45203625

VALUES

ASSESSED VALUES DETERMINED BY ASSESSOR PHILIP E. WATSON AT 25% OF MARKET VALUE EXCEPT AS NOTED ON BACK OF BILL.

MARKET VALUE

BUS PP	835400
TOTAL	835400

ASSESSED VALUE

BUS PP	208850
TOTAL	208850

RATES AND DISTRIBUTION OF AMOUNTS BY TAXING AGENCY

TAXING AGENCY	RATE	AMOUNT
LOS ANGELES	2 5157	5254 03
COUNTY	4 0882	8538 20
UNIFIED SCHOOLS	4 7952	10014 78
JUNIOR COLLEGE	4489	937 53
FLOOD CONTROL	3552	
WATER REPLENISH	12	
WATER AGENCIES	1700	355 05
MOSQUITO ABATE	57	11 90
TOTAL	12 3801	25111 49

TOTAL TAX	25111	49
6% Penalty After Aug. 31, 1971		
Collection Costs		
Additional Penalties		
Total After Penalties		

SEE REVERSE SIDE FOR IMPORTANT INFORMATION

YOUR CANCELLED CHECK IS YOUR BEST RECEIPT

Complete the following for your records:

If you require an additional receipt, please check this box and return entire bill with your payment.

Date Paid Check No.

Exhibit B

(Extracts from 1970 Report of the Port of Los Angeles)

BALANCE SHEET June 30, 1970 and 1969

ASSETS:	1970	1969
Properties, at cost or appraised amounts including construction in progress (Note 1)	$201,958,045	$195,117,846
Less, Allowance for depreciation and amortization	45,764,003	43,422,060
	156,195,042	151,695,786
Current Assets:		
Cash on hand and on deposit with City Treasurer:		
Revenue Fund	1,569,393	1,666,681
Bond Fund (Restricted as to use)	1,310,716	1,212,030
	2,880,109	2,878,711
United States Treasury Bills, as cost, (approximate market)		
Revenue Fund	9,652,910	8,734,707
Bond Funds (Restricted as to use)	6,287,505	6,262,326
Accounts receivable, including accrued interest, less $35,000.00 allowance for doubtful accounts	2,346,812	2,721,036
Materials and supplies, at average cost	271,931	213,123
Total current assets	21,439,267	20,889,903
Deferred charges, principally deferred insurance premiums and proposed capital projects	433,451	508,469
	$178,067,760	$173,094,158
LIABILITIES:		
Equity of the City of Los Angeles:		
Investment of funds raised by taxation	$ 31,306,519	$ 31,306,519
Capital surplus	45,848,617	45,848,617
Earned surplus	64,783,398	59,837,978
	141,938,534	136,993,114
Bond indebtedness (less due within one year) (Note 2):		
Revenue Bonds:		
Issue of 1960, maturing to 1985, interest from 3.5% to 3.9%	9,920,000	10,450,000
Second issue, maturing to 1986, interest from 2.6% to 3.5%	10,910,000	11,400,000
Issue of 1965, maturing to 1990, interest from 2.9% to 5%	10,320,000	10,640,000
	31,150,000	32,490,000
Current liabilities:		
Accounts payable and accrued expenses	3,077,096	1,773,555
Bonds outstanding, due within one year	1,340,000	1,140,000
Total current liabilities	4,417,096	2,913,555
Unamortized construction costs advanced by lessees and other credits	562,130	697,439
Commitments and Contingency (Note 3)		
	$178,067,760	$173,094,158

Exhibit B (continued)

STATEMENT OF INCOME AND EARNED SURPLUS For the years ended June 30, 1970 and 1969

GROSS REVENUES:	1970	1969
Services:		
Dockage	$ 1,333,986	$ 1,555,616
Wharfage	6,274,201	6,363,605
Storage	125,365	102,918
Demurrage	446,387	330,704
Pilotage	902,035	884,080
Assignment charges, preferential	370,986	176,495
Assignment charges, temporary	662	—
Wharf and shed revenue	454,190	331,328
Total Services	10,008,091	9,744,946
Rentals:		
Land	3,839,622	3,485,104
Pipeline rights-of-way	26,946	72,842
Special facilities	5,300	6,000
Buildings	68,077	68,128
Warehouse building rentals	514,332	425,955
Total Rentals	4,454,277	4,059,029
Other:		
Warehouses	308,063	262,188
Municipal terminal railway	39,638	38,644
Oil royalties	207,187	217,578
Permits and concessions	37,876	36,930
Miscellaneous	6,820	6,969
Total other	599,584	562,309
Total gross revenue	15,061,952	14,315,284
OPERATING AND ADMINISTRATIVE EXPENSES:		
Revenue producing facilities	2,214,042	1,799,948
Non-revenue producing facilities	656,251	504,909
General operating	2,026,970	1,726,792
Administrative (Note 4)	2,697,848	2,294,460
Total operating and administrative expenses	7,595,111	6,326,105
Income from operations before depreciation	7,466,841	7,989,179
Less, provisions for depreciation (Note 1)	2,565,799	2,393,755
Income from operations	4,901,042	5,595,424
Other income or (expenses), net	19,692	(124,340)
	4,920,734	5,471,084
Interest income from fund investments:		
Harbor Revenue Fund	720,657	402,982
Bond Service Fund, Issue of 1960	84,881	71,795
Bond Service Fund, Second Issue	85,014	69,414
Bond Service Fund, Issue of 1965	75,830	62,519
Bond Construction Fund, Issue of 1965	210,137	269,591
Total interest income from fund investments	1,176,529	876,301
	6,097,263	6,347,385
Interest expense on bonds:		
General Obligation Bonds	—	651
Revenue Bonds, Issue of 1960	411,753	429,771
Revenue Bonds, Second Issue	378,110	390,508
Revenue Bonds, Issue of 1965	361,970	370,520
Total interest expense on bonds	1,151,843	1,190,450
Net income	4,945,420	5,156,935
Earned surplus, beginning of year	59,837,978	54,681,043
Earned surplus, end of year	$ 64,783,398	$ 59,837,978

Exhibit C

(Extracts from 1971 Report of the Port of Los Angeles)

STATEMENT OF INCOME AND EARNED SURPLUS

For the Years Ended June 30

	1971	1970
Gross revenues		
Services		
Dockage	$1,418,800	$1,353,965
Wharfage	6,797,950	6,274,291
Storage	157,105	125,385
Demurrage	403,907	446,597
Pilotage	940,431	982,035
Assignment charges, preferential	485,298	370,968
Assignment charges, temporary	2,290	662
Wharf and shed revenue	451,923	484,190
Total services	10,639,774	10,069,091
Rentals		
Land	4,101,817	3,639,622
Pipeline rights of way	27,023	26,946
Special facilities	3,900	5,300
Buildings	71,044	66,077
Warehouse building rentals	626,570	514,332
Total rentals	4,830,354	4,484,277
Other		
Warehouses	407,909	308,063
Municipal terminal railway	31,550	38,638
Oil royalties	202,910	207,187
Permits and concessions	35,923	37,876
Miscellaneous	7,123	6,820
Total other	684,515	598,584
Total gross revenues	16,153,643	15,061,952
Operating and administrative expenses		
Revenue producing facilities	2,055,348	2,214,042
Nonrevenue producing facilities	696,482	656,251
General operating	2,484,535	2,026,970
Administrative (Note 4)	3,343,840	2,697,848
Total operating and administrative expenses	8,580,215	7,596,111
Income from operations before depreciation	7,573,428	7,466,841
Less, Provision for depreciation (Note 1)	2,675,268	2,565,799
Income from operations	4,898,160	4,901,042
Other income, net (including gain on sale of land in 1971 of $314,872)	375,666	19,692
	5,273,826	4,920,734
Interest income from fund investments		
Harbor Revenue Fund	422,172	720,687
Bond Service Fund, Issue of 1960	91,428	84,991
Bond Service Fund, Second Issue	82,696	85,014
Bond Service Fund, Issue of 1965	70,204	75,830
Bond Construction Fund, Issue of 1965	91,266	210,137
Bond Service Fund, Issue of 1971	16,223	
Bond Construction Fund, Issue of 1971	152,548	
Total interest income from fund investments	926,717	1,176,529
	6,200,542	6,097,263
Interest expense on bonds		
Revenue Bonds, Issue of 1960	393,884	411,783
Revenue Bonds, Second Issue	364,942	378,110
Revenue Bonds, Issue of 1965	345,320	361,970
Revenue Bonds, Issue of 1971	220,638	
Total interest expense on bonds	1,324,844	1,151,843
Net income	4,875,698	4,945,420
Earned surplus, beginning of year	94,753,300	89,837,878
Earned surplus, end of year	$99,630,300	$94,753,300

The accompanying notes are an integral part of this statement.

STATEMENT OF CHANGES IN FINANCIAL POSITION

For the Years Ended June 30,

	1971	1970
Sources of cash:		
Operations		
Net income	$4,875,698	$4,945,420
Add (deduct):		
Depreciation expense, which requires no outlay of cash	2,675,268	2,565,799
Decrease in deferred credits included in net income	(135,573)	(135,359)
Total cash provided from operations	7,415,393	7,375,860
Decrease in investment in United States Treasury bills	12,987,945	
Sale of Harbor Revenue Bonds, Issue of 1971	15,000,000	
Decrease in accounts receivable and accrued interest		374,224
Decrease in deferred charges		75,018
Increase in accounts payable and accrued expenses		1,303,541
	$35,398,538	$9,128,643

	1971	1970
Uses of cash:		
Increase in accounts receivable and accrued interest	$329,919	
Additions to properties, net of dispositions	9,450,294	$7,085,063
Increase in investment in United States Treasury bills		893,382
Increase in inventory of materials and supplies	11,641	58,908
Increase in deferred charges	40,895	
Redemption of bonds outstanding	1,340,000	1,140,000
Paid into General Fund of City of Los Angeles as return of investment	500,000	
Decrease in accounts payable and accrued expenses	387,924	
Increase in cash	23,336,864	1,290
	$35,398,538	$9,128,643

Appendix

Exhibit D

Ambassade van het Koninkrijk der Nederlanden
Royal Netherlands
Embassy

4200 Linnean Avenue, N.W.
Washington, D.C. 20008
No. VA/5569 May 16, 1978

Dear Mr. Bank,

On behalf of the Governments of Denmark, Finland, France and the United Kingdom as well as on behalf of my own Government I wish to inform you that these Governments share the concern expressed in the aide-mémoire of March 27 of the Embassy of Japan regarding the imposition by the State of California of property tax on containers owned by foreign shipping lines.

The possibility that an example set in this respect by the State of California may be followed in other States is viewed by the aforementioned Governments with considerable apprehension.

Sincerely Yours,

/s/ Jan Krol
Jan Krol
Chairman, Cotton Club

Mr. Richard K. Bank
Director,
Office of Maritime Affairs
Department of State
Room 5826
2201 C Street, N.W.
Washington, D.C. 20520

Exhibit E

Botschaft der
Bundesrepublik Deutschland

Washington, den
May 25, 1978
Ne/tu

Mr. Richard Bank
Office of Maritime Affairs
Department of State
Washington, D. C. 20590

Dear Richard,

As already discussed on the phone, I would like to let you know that the Federal Republic of Germany is associating itself with the letter of the Chairman of the Cotton Club concerning California Property Tax on foreign containers.

I would like to add that we would consider it a serious burden on international commerce if local or state taxation would distort costs of service. To avoid such difficulties would be in the interest of an unimpeded cargo flow and would thus promote the trade between our countries.

I understand that the issue is pending before the Supreme Court of the United States and that there are legislative proposals pending in the Legislature of California to extend the exemption for foreign containers beyond 1978.

It would be appreciated if the Department of State could convey this message to the pertinent authorities here in the United States.

Sincerely yours,

2) H. Thilo zgK
3) z. Vorg.

Exhibit F

Royal Norwegian Embassy
1401 Massachusetts Avenue, N.W.
Washington D. C. 20007
4200 Wisconsin Ave., N.W.,
Washington D. C. 20016

AB/ts 25 July 1978.

Mr. Richard Bank
Director,
Office of Maritime Affairs
Department of State
Washington D.C. 20520.

Dear Richard,

Referring to a recent telephone conversation between Mr. Carl Taylor of your office and Mr. Finn Bergesen of this Embassy, I would hereby like to confirm that Norway associates itself with the Chairman of the Cotton Club's letter to you of 16 May, 1978, concerning the State of California's introduction of property taxation of ship containers.

Sincerely yours,

Alf Bergesen
Counselor Shipping
and Civil Aviation

Exhibit G

March 13, 1978

Tentative Proposal of State Board of Equalization For Public Hearing In June 1978

Rule No. 202. (Cal. Adm. Code) Allocation of Aircraft of Certificated Air Carriers and Scheduled Air Taxi Operators

(a) Air taxis. An aircraft whose owner on the lien date used it in scheduled air taxi service at any time during the representative period selected pursuant to subsection (f), or which has been purchased for scheduled air taxi service but not yet put into such service and not yet used in any other service, is assessable under sections 1150 and 1156 of the Revenue and Taxation Code and not under Part 10, Division 1, or under other situs provisions of Part 2, Division 1, of the Revenue and Taxation Code.

(b) Situs. Aircraft operated by certificated air carriers (within the meaning of section 1150 of the Revenue and Taxation Code) or scheduled air taxis (within the meaning of subdivisions (a) and (b) of section 1154 of the Revenue and Taxation Code) and flown in intrastate, interstate, or foreign commerce shall be deemed to be situated only in those taxing agencies (within the meaning of section 404 of the Revenue and Taxation Code) in which the aircraft normally make physical contact. The physical contact must be intentional rather than by accident or as the result of an emergency, and it must involve embarking or disembarking of crew, passengers, or freight.

Aircraft flying over the state without landing do not acquire situs for property tax purposes. Conversely, the situs of aircraft that depart from a taxing agency within the state, fly out of the state, and return to the same or another taxing agency within the state without landing outside the state is within the state's taxing jurisdiction throughout the flight.

Situs for property tax purposes is not affected by the legal or commercial domicile of the operator of the aircraft, nor by the fact that the aircraft is operated solely in foreign commerce.

(c) Allocation formula. The allocation formula to be used by each assessor is composed of two factors: (1) ground and flight time and (2) aircraft arrivals and departures.

Time allocable to an airport is the amount of time that certificated aircraft and scheduled air taxis are on the ground at the arport, plus a portion of the incoming and outgoing flight time computed pursuant to subsection (d). The ratio of the time allocable to the airport during a representative period to the sum of the time allocable to the airport and the time allocable elsewhere is the ground and flight time factor. In computing the ground and flight time factor, the following shall be excluded:
From the time allocable to the airport—

(1) All ground and flight time prior to the aircraft's first entry into the revenue service of the air carrier in control of the aircraft on the current lien date.

(2) All ground time in excess of 12 consecutive hours at the airport following entry into revenue service.

From the total time—

(1) All ground and flight time prior to the aircraft's first entry into the revenue service of the air carrier in control of the aircraft on the current lien date.

This factor shall be multiplied by 75 percent to obtain a weighted ground and flight time factor.

The aircraft arrivals and departures factor is the ratio of the number of arrivals at and departures from an airport during a representative period to the total number of arrivals at and departures from all airports during the representative period. This factor shall be multiplied by 25 percent to obtain a weighted arrivals and departures factor.

The weighted time factor shall be added to the weighted arrivals and departures factor. The sum of the two weighted factors yields the allocation ratio to be applied to the full cash value of the aircraft to determine the full cash value allocable to the airport.

(d) Allocation of Flight Time. For aircraft flying from one California airport to another California airport, the flight time attributable to each airport is one-half the flight time between the airports.

For aircraft arriving from an airport outside the state or leaving for an airport outside the state, the flight time from or to the state boundary shall be allocated to the California airport in which the aircraft first lands or last takes off, as the case may be. The flight time to the state boundary shall be computed as follows: (1) determine the mileage from the airport to the state boundary crossing point on a great circle flight to the first landing point outside the state; (2) divide this mileage by the total great circle mileage from the airport to the first landing point

outside the state; (3) multiply this percentage by the total flight time from the airport to the first landing point outside the state. The same procedure shall be used for inbound flights from outside the state. To allow for differences in take-off, landing, and cruising speeds and for varying take-off and landing patterns, the time allocated to an airport shall not be less than five minutes for an incoming or an outgoing flight. In lieu of the actual flight time for a single flight, the average flight time between two ports, or between a port and the state line, for two or more flights of a single carrier or of more than one carrier shall be used when such an average is promulgated by the board unless the assessor has determined evidence which justifies departure from such average time.

(e) Sources of Allocation Data. For scheduled operations, arrivals and departures and ground and flight time shall be derived from the carrier's operating schedules. For nonscheduled operations, including, but not limited to, overhaul, pilot training, charter, military contract flights, and standby services, ground and flight time and arrivals and departures shall be derived from the carrier's recorded operations.

(f) Representative Period. Annually, on or before February 15, the board shall consult with the assessors of the counties in which air carriers' aircraft normally make physical contact. On or before March 1, the board shall designate a representative period to be used by all assessors in assessing the aircraft of each carrier for the forthcoming fiscal year.

(g) Application of Allocation Formula. The aircraft of certificated air carriers and scheduled air taxi operators shall be segregated by type, and a separate allocation ratio

shall be computed for each type which has established a tax situs within the state, excluding those makes within a type which have not established a tax situs within the state. Each allocation ratio shall then be applied to the total value of the carrier's aircraft of each type to which the allocation ratio applies, excluding those makes within a type which have not established a tax situs within the state.

The types are as follows:

(1) Piston-powered

(2) Turboprop-powered

(3) Helicopter

(4) Turbojet and Turbofan powered

(A) Two engine

(B) Three engine

(C) Four engine

(D) DC-8-60 series

(E) Boeing 747

(F) DC-10 and L 1011

• • •

Exhibit H

UNOFFICIAL TRANSLATION

The Embassy of Mexico presents its compliments to the Department of State and has the honor to refer the Department of State to a March 24, 1978 letter from the California State Board of Equalization (copy attached). Annexed to this letter is a proposed amendment to the California Tax Regulations which would enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Government of Mexico respectfully submits that the imposition of a property tax on aircraft owned by foreign airlines operating into and out of California would directly contravene the United States' treaty obligations set forth in Article 24 of the Convention on International Civil Aviation (the "Chicago Convention") and the United States' representations to the other Contracting States of the Convention with respect to the exemption from property taxes on aircraft engaged in international air transportation, as set forth in the supplement to ICAO Document 8632-C/968.

The Government of Mexico respectfully invites the attention of the Department of State to the language of Article 24 of the Chicago Convention which states

..........................2/

that "aircraft on a flight to, from, or across territory of another contracting State are to be admitted temporarily free of duty. . ." In the considered opinion of the Government of Mexico, the exemption from "duty" provided by

the Convention must necessarily include an exemption from property taxes, whether attempted to be imposed by the United States of America itself or by any individual State or political subdivision thereof. If this were not so, the exemption from "duty" would have little practical value or meaning.

The attention of the Department of State is also invited to Section III of the ICAO "Council Resolution of 14 November 1966 on Taxation of the Income of International Air Transport Enterprises and on Taxation of Aircraft," and particularly Clause (1) (b) thereof, which states:

> "(1) *Each Contracting State shall,* to the fullest extent possible, *grant* reciprocally
>
> (b) *Exemption from property* taxes, and capital levies or other similar taxes, *on aircraft of other Contracting States engaged in interna-*
>
> 3/
>
> *tional air transport*; . . ." (Emphasis supplied).

In further accordance with this Resolution, the Department of State is reminded that each Contracting State, including the United States, was to notify ICAO of the extent to which it was prepared to take action in accordance with the principles of this Resolution. In this regard, the United States specifically and unequivocally represented to the other Contracting States of ICAO that:

> "The United States is in accord with the principles set forth in this Clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this Clause through bilateral agreements with other

> countries, or, in appropriate cases, by means of administrative rulings."

The United States' statement then declares that such agreements have been concluded today with over forty countries, including Mexico. Thus, it is respectfully the opinion of the Government of Mexico that the United States has already committed itself to a practice of exempting aircraft operating under the flag of Mexico and which are engaged in international air transporta-

..........................4/

tion from the levy of any property tax within the United States.

The Government of Mexico would also invite the Department of State's attention to the consideration of various policy factors which are necessarily germane to this issue: First, aircraft operating in international air transportation under the flag of Mexico are already subject to full taxation in Mexico. Thus, if property tax were to be imposed by the United States or any individual State or political subdivision thereof, the aircraft would thus be doubly taxed—by the Government of Mexico and also by the United States. Such a tax burden is both unfair to the air transport enterprises involved and also a frustrating, but preventable, impediment on the smooth development of trade and travel between our two countries. It is indeed the very purpose for which Section III of the ICAO Council Resolution of 14 November 1966 was formulated and approved.

In the particular case of Mexico and the United States, there is an agreement effected by exchange of notes signed at Washington August 7, 1964 and applicable with taxable years beginning on or after January 1st, 1964 for the re-

lief from double taxation on earnings from operation of ships and aircraft, through reciprocal exemption.

..........................5/

Although the agreement only covers federal income taxes, we believe that the imposition of a tax on capital represented by the aircraft is of such analogous character that it would substantially violate the spirit of our agreement and consequently give rise to its possible termination according to point four of both exchange notes.

When the agreement was being negotiated, the Ministry of Foreign Affairs of Mexico specifically raised the issue of state or local authorities contravening the agreement by imposing taxes on ships and aircrafts, and although it was not inserted into the agreement, it was thought that the proper remedy for such violation would be the termination of the agreement.

Secondly, it seems clear to the Government of Mexico that the imposition of a property tax on the aircraft of non-U.S. airlines operated to or from the United States of America in foreign commerce could immediately lead to the taxation of aircraft of U.S. airlines by foreign governments and their local political subdivisions. Once the United States abandons the principle of reciprocal exemption from property taxation of aircraft, there is little reason other governments will have to refrain from imposing similar property taxes. No one stands

..........................6/

to gain from such an escalation of trade barriers as would come about, least of all carriers of the United States which would find themselves with aircraft subject to property tax in many foreign jurisdictions.

The Government of Mexico is deeply concerned about the possible international complications which could result

if the State of California were to impose a property tax on foreign aircraft operated in foreign commerce. The Government of Mexico respectfully urges the Government of the United States to take immediate and appropriate action to prevent the imposition of a property tax on foreign-registered aircraft by the State of California, in order to assure continued growth and development of trade and other relations between our two countries. This is specially important at a moment in which our two countries have just signed a new agreement in civil aeronautics that responds to the philosophy of both our Governments with respect to the substantial lowering of the rates for air transportation as an effective means of bringing our people together. The proposed tax by the State of California would set an ominous example to other local authorities and would certainly seem to negate the declared international policy of the Carter Administration with

..........................7/

respect to the elimination of non-tariff trade barriers.

The Embassy of Mexico believes that the proper forum for the United States Government to oppose such action, will be the hearing that the California State Board of Equalization will hold in Sacramento June 29, 1978. In this respect, there is a position developed by the Administration on a parallel case and embodied in the letter that on December 19, 1977 the General Counsel of the Office of the Special Representative for Trade Negotiations, Mr. Richard Rivers, addressed to Attorneys Sheldon Cohen and Peter Briger on the subject of foreign oceangoing containers taxed by local governmental units of the State of California. (copy of this letter is also attached).

Washington, D.C., June 15, 1978.

Encls.

Exhibit I

EMBASSY
OF THE
FEDERAL REPUBLIC OF GERMANY
WASHINGTON, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to inform the Department of the following matter:

By circular letter, dated March 24, 1978 the California State Board of Equalization has expressed its intent to assess property taxes against foreign owned and operated aircraft employed in the foreign commerce of the United States and using facilities in California. A proposed Amendment to the California Tax Regulations is pending.

This Embassy has been instructed to express the strong concern of the Government of the Federal Republic of Germany that this tax if imposed will constitute an undue burden on and impediment to the flow of international traffic and Commerce and will be in violation of multilateral and bilateral international Commitments of the United States of America.

Article 24 of the "Chicago Convention" provides that aircraft of contracting parties be admitted temporarily to the territory of other contracting parties free of duty. Both the Federal Republic of Germany and the United States are parties to that convention.

It is the position of the Government of the Federal Republic of Germany that, as far as this provision is concerned, no difference can be made between State—or Federal Taxes—or duties in the United States. Article 24 is intended to facilitate international air transportation, its purpose would be destroyed if its commitment would only bind the federal authorities. It seems obvious that such a result would be in contradiction to the intentions of the contracting parties.

Furthermore, Paragraph 1 (b), Section III of the ICAO Council Resolution of November 14, 1966 requires that member countries grant each other exemption from property taxes for aircraft engaged in International Air Transportation on the basis of reciprocity. The Government of the United States informed ICAO that it adheres to this principle either by bilateral agreements or through administrative rulings. There are no taxes assessed against foreign Aircraft in the Federal Republic of Germany.

Article 7 of the Air Transport Agreement between the Federal Republic of Germany and the United States of America of July 7, 1955 stipulates that certain activities and transactions connected with the operation of German civil aircraft on the territory of the United States of America be exempted from duties, fees and charges. Aircraft as such are not mentioned in the Bilateral Agreement. This is due to the fact (as reflected by the proceedings of the negotiations in 1955) that both contracting parties agreed that the exemption of aircraft is covered by Article 24 of the Chicago Convention. An inclusion in the Bilateral Agreement was therefore considered not to be necessary.

This Embassy wishes to point out that the question whether the exemption of Article 7 applies only to Federal and not to State taxes in the USA has been disputed before. The Government of the Federal Republic of Germany wishes to reiterate its position that according to its inter-

pretation of the Treaty, Federal, State and Local taxes are covered by the exemption.

The imposition of State Taxes on German aircraft in California would raise serious doubts whether the principle of reciprocity which governs the exemption of US-aircraft in the Federal Republic of Germany is still maintained and would lead to a reevaluation of that situation by German tax authorities. Furthermore, apart from the distortion of cost structures between airports the California tax example might induce other States to levy comparable taxes on foreign aircraft and eventually on other modes of international transportation as well. Retaliation by other countries might then subject international carriers to multiple taxation which would be clearly in contradiction to efforts to facilitate international Commerce.

Washington, D.C., June 23, 1978

TH 11/6

Exhibit J

California Property Tax

(Note to State Department)

June 19, 1978

The Canadian Embassy presents its compliments to the Department of State and has the honour to refer to a circular of the California State Board of Equalization dated March 24, 1978, pertaining to an amendment to the California Tax Regulations. The purpose of this amendment is to enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Canadian Embassy wishes to express the concern of the Canadian Government at the apparent inconsistency of this proposal with the Convention on International Civil Aviation to which both Canada and the United States are parties and of which Article 24 specifically states that "aircraft on a flight to, from, or across the territory of another Contracting State shall be admitted temporarily free of duty". It is the understanding of the Canadian Government that this exemption applies to any form of taxation, whether imposed by national or state authorities. It will also be noted that Article 15 of the same Convention stipulates that "no fees, dues or other charges shall be imposed by any Contracting State in respect only of the right of transit over or entry or exit from its territory for any aircraft".

The Government of Canada wishes furthermore to draw the attention of the Government of the United States to

Section III of the ICAO Council Resolution of the taxation of income of international air transport enterprises and the taxation of aircraft, and particularly to paragraph 1(B) of that section, whereby "each Contracting State shall, to the fullest extent possible, grant reciprocally . . . exemption from property taxes . . . on aircraft of other Contracting States engaged in international air transport". The Government of the United States will also recall its statement in that connection to the effect that it "is in accord with the principles set forth in this clause" and that it has "for a long period of time followed the practice of granting the exemptions provided for in this clause through bilateral agreement wtih other countries, or, in appropriate cases, by means of administrative ruling".

The Government of Canada wishes furthermore to refer to the Air Transport Agreement between Canada and the United States of January 17, 1966, as amended, and particularly to Article XI of that Agreement, which stipulates that "each Contracting Party shall exempt the designated airlines of the other Contracting Party to the fullest extent possible under its national law from import restrictions, customs duties, excise taxes, inspection fees and other national duties . . .". While this provision does not explicitly rule out a state-imposed property tax on Canadian aircraft used in international service, it will be clear that such a tax would negate the very intent of this provision and that it would introduce a new element in regard to the equitable exchange of benefits expected to be derived from that Agreement.

It will be apparent that the Canadian Government is concerned at the repercussions of a proposal, which, if enacted, would open the way to similar application by the authorities of other states. As, moreover, Canadian air-

craft are already fully taxed in Canada, the application of such a tax by any state would result in double taxation, the effect of which would be to alter the present position of reciprocity. It is finally clear that the imposition of such a tax, in addition to introducing a potentially destabilizing factor in air relations, would place on foreign airlines, and in particular on Canadian airlines in view of the extensiveness of air service between our two countries, an additional and substantial burden at a time when those airlines are engaged in making air travel more readily accessible to the travelling public.

The Government of Canada hopes that these concerns will be taken into account by the Government of the United States and that, should the intention of the California State Board of Equalization be confirmed, appropriate action would be taken by the Government of the United States of America to prevent the imposition of a property tax on foreign aircraft by the State of California.

The Canadian Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Exhibit K

The Embassies of Denmark, Norway and Sweden present their compliments to the Department of State and have the honour to refer the Department of State to a March 24, 1978 letter from the California State Board of Equalization (copy attached). Attached to this letter is a proposed amendment to the California Tax Regulations which would enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Governments of Denmark, Norway and Sweden submit that the imposition of a property tax on aircraft owned by foreign airlines operating into and out of California would be contrary to the obligations set forth in Articles 15 and 24 of the Convention on International Civil Aviation and the United States representations to the other Contracting States of the Convention with respect to the exemption from property taxes on aircraft engaged in international air transportation, as set forth in the Supplement to ICAO Document 8632-C/968. The attention is invited in particular to Clause (1) (B) Section III of the ICAO Document containing Council Resolution of 14 November 1966 on Taxation of the Income of International Air

......................../2

Transport Enterprises and on Taxation of Aircraft. In accordance with this Resolution, each Contracting State, were to notify ICAO of the extent to which it was prepared to take action in accordance with the principles of this Resolution. In this regard, the United States represented to the other Contracting States of ICAO that:

> "The United States is in accord with the principles set forth in this Clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this Clause through bilateral agreements with other countries, or in appropriate cases, by means of administrative rulings".

The United States' statement then went on to declare that such agreements had been concluded today with several countries. Thus, it is the opinion of the Governments of Denmark, Norway and Sweden that the United States has already adopted a policy of exempting aircraft which are engaged in international air transportation from the levy of any property tax within the United States.

The Governments of Denmark, Norway and Sweden would also like to note various policy factors which are relevant to this issue. Aircraft operating in international air transportation under the flag of Denmark, Norway or

......................../3

Sweden are already subject to full taxation in those countries. If a property tax were to be imposed by the United States or any individual State or political subdivision thereof, the aircraft would be doubly taxed. Such a double tax burden would be unfair to the air transport enterprises involved and would also be an impediment to the development of trade and travel between our countries. The avoidance of such a situation was the purpose for which Section XXI of the ICAO Council Resolution of 14 November 1966 was formulated and approved.

Furthermore, it seems clear to the Governments of Denmark, Norway and Sweden that the imposition of a property tax on the aircraft of non-U.S. airlines operated to

and from the United States may lead to taxation of aircraft of U.S. airlines by foreign Governments and their local political subdivisions. No one stands to gain from such an escalation of trade barriers.

The Governments of Denmark, Norway and Sweden are deeply concerned with the possible international complications which could result if the State of California were to impose a property tax on foreign aircraft operated in foreign commerce. The Governments of Denmark, Norway and Sweden urge the Government of the United States to make immediate and appropriate action to prevent the imposition of a property tax on foreign aircraft by the State of California in order to assure continued growth and development of trade and other relations between our countries.

Washington, D.C.
June 13, 1978

Exhibit L

28 Juin 1978.

L'Ambassade de France présente ses compliments au Département d'Etat et a l'honneur de lui exposer ce qui suit:

L'Ambassade de France a été informée de l'intention de l'Administration des Impôts de l'Etat de Californie (California State Board of Equalization) de modifier la réglementation fiscale de cet Etat afin de permettre à ce dernier, ainsi qu'aux contrôleur locaux des contributions, de lever une taxe sur la propriété des avions appartenant aux compagnies aériennes étrangères qui exploit un service commercial de et vers la Californie, projet rendu publie par une lettre circulaire de l'Administration des Impôts de l'Etat de Californie en date du 24 Mars 1978.

La taxe envisagée serait imposée par les Autorités financières locales et celles de l'Etat de Californie sur des appareils affectés au trafic international par les compagnies aériennes étrangères et celle ne serait fondée sur le coût d'aucun service rendu.

Les Autorités françaises rappellent qu'elles n'imposent à aucun niveau, de taxes similaires aux avions appartenant aux compagnies aériennes étrangères et notamment américaines exploitant de et vers la France.

Elles estiment donc que l'imposition de cette taxe aux appareils appartenant aux compagnies françaises constituerait une discrimination contraire aux dispositions du Protocole de signature de l'Accord entre la France et les Etats-Unis d'Amérique relatif aux services aériens entre

leurs territoires respectifs signé à Paris le 27 Mars 1946. Ce Protocole stipule en effet:

"Il est apparu, au cours des négociations ayant abouti à la conclusion de l'Accord relatif aux services aériens entre les territoires français et les territoires des Etats-Unis d'Amérique signé à Paris en date de ce jour, que les représentants des deux Parties contractantes étaient d'accord sur les points suivants:

1) Les entreprises aériennes des deux Parties contractantes exploitant les lignes mentionnées à l'annexe au dit Accord doivent pouvoir bénéficier de possibilités égales pour l'exploitation desdites lignes".

L'imposition de la taxe envisagée entraînerait en outre un déséquilibre des accords de double imposition existants et en cours de négociation entre les deux pays.

Les Autorités françaises demandent en conséquence aux Autorités américaines que les entreprises aériennes françaises soient exemptes du champ d'application de la taxe proposée. Elles rappellent à ce propos que, dans l'échange de lettres du 28 Juillet 1967, annexe à la Convention Franco-Américaine en matière d'impôt sur le revenu et la fortune, le gouvernement des Etats-Unis a donné l'assurance qu'il interviendrait auprès des Etats-Unis Fêdérés si ceux-ci entendaient soumettre nos compagnies aériennes à des impôts locaux, en échange de l'assurance que nous apportions de ne pas soumettre à la patente les compagnies américaines.

Les Autorités françaises souhaitent également appeler l'attention des Autorités américaines sur la section III paragraphe (B) de la résolution du Conseil de l'OACI en date du 14 Novembre 1966 qui dispose que "chaque Etat contractant doit accorder dans toutes la mesure du possible, moyennant réciprocité B) l'exemption des charges fiscales frappant la propriété et le capital ou de toute espèce de charges fiscales analogues perçues sur les aéronefs d'autres Etats contractants effectuant des transports aériens internationaux". A la suite du vote de cette résolution, les Autorités américaines ont déclaré de manière précise et non équivoque aux autres Etats contractants de l'OACI qu'elles étaient d'accord sur le principe précité et avaient, de longue date et conformément à leur législation, accordé l'exemption prévue par cette résolution au moyen d'accords bilatéraux avec d'autres pays ou de mesures administratives appropriées.

Une telle taxe serait, de surcroît, incompatible avec le principe de la non discrimination prévu par la Convention de Chicago, notamment en son article 15 qui stipule en particulier: "Aucun Etat contractant ne doit imposer de droits, taxes ou autres redevances uniquement pour le droit de transit, d'entrée ou de sortie de son territoire de tout aéronef d'un Etat contract."

Les Autorités françaises souhaitent souligner que si l'imposition de cette taxe était autorisée, d'autres Etats Fédérés des Etats-Unis pourraient également vouloir mettre en vigueur une taxe analogue, ce qui aggraverait lourdement les coûts d'exploitation des entreprises de transport aérien françaises—qui sont déjà imposées en France—au détriment des intérêts non seulement de ces compagnies mais aussi de public.

Elles estiment enfin que l'imposition d'une telle taxe risque d'entraîner, de la part des Autorités locales ou centrales d'autres Etats étrangers, des mesures de taxation analogues ayant pour effet d'apporter une entrave au développement du transport aérien.

A la lumière de ces observations, les Autorités françaises seraient reconnaissantes au Département d'Etat de bien vouloir les informer des actions que les Autorités américaines comptent entreprendre pour prévenir l'imposition par l'Etat de California d'une taxe sur la propriété des avions étrangers./.

L'Ambassade de France saisit cette occasion pour renouveler au Département d'Etat les assurances de sa très haute considération.

Exhibit M

EMBASSY OF JAPAN
WASHINGTON
July 20, 1978

AIDE-MEMOIRE

The Board of Equalization of the State of California has recently proposed an amendment to Section 202 of its Tax Regulation which would enable the State of California and its local county assessors to levy a local property tax on foreign aircraft engaged in air service to and from the State of California. With regard to the proposed tax, the Japanese Government invites the attention of the U.S. Government to the following points and hopes that, with a view to developing and maintaining smooth commercial relations between our two countries, the U.S. Government would take appropriate measures to prevent this taxation.

1. Article 24 of the Convention on International Civil Aviation, which stipulates mutual exemption of duties among contracting countries, and other articles of Chapter 4 of the Convention set forth measures to facilitate the smooth operation of international civil air transportation. This proposed taxation would be in contradiction to the fundamental concepts envisaged in Chapter 4 of the Convention because it would be a barrier to the smooth operation of international civil air transport services.

2. While Paragraph 1(b), Section III of the ICAO Council Resolution of November 14, 1966, requires that member countries grant each other exemption from property taxes for aircraft engaged in international air services and the

U.S. Government, in this respect, explicitly announced that it would adhere to the principles set forth in this Resolution, it seems that the proposed tax would not go along with the spirit of the Resolution.

3. As to municipal taxes in Japan which correspond to the proposed tax, no such taxes are assessed at present against foreign aircraft in Japan. If this proposed tax is implemented, an inconsistency would therefore be brought about between the two countries in connection with the imposition of taxes on foreign aircrafts. This situation could interfere with the smooth commerce between our two countries and, accordingly, the Japanese Government is deeply concerned about the future development of this matter.

Exhibit N

The Netherlands Ambassador presents his compliments to the Honourable the Secretary of State and has the honor to draw Mr. Vance's attention to the following matter.

In view of a proposed amendment to the California tax regulations which would enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California, I may draw your attention to the following.

The Government of the Netherlands submits that the imposition of a property tax on aircraft owned by foreign airlines operating into and out of California would directly contravene the United States' treaty obligations set forth in article 24 of the Convention on International Civil Aviation (the so-called "Chicago Convention") and the United States' representations to the other contracting States of the Convention with respect to the exemption from property taxes on aircraft engaged in international air transportation as set forth in the supplement to ICAO document 8632-6/968.

The Government of the Netherlands invites the attention of the Department of State to the language of article 24 of the Chicago Convention which states that "aircraft on a flight to, from, or across territory of another contracting State are to be admitted temporarily free of duty . . . .". In the considered opinion of the Government of the Netherlands, the exemption from "duty" provided by the Convention must necessarily include an exemption from property taxes, whether attempted to be imposed by the United States of America itself or by any individual State or

political subdivision thereof. If this were not so, the exemption from "duty" would have little practical value or meaning.

The attention of the Department of State is furthermore drawn to section iii of the ICAO "Council Resolution of 14 November 1966 on taxation of the income of international air transport enterprises and on taxation of aircraft," and particularly clause (1)(b) thereof, which states:

> "(1) *each contracting State shall,* to the fullest extent possible, *grant* reciprocally
>
> (b) *exemption from property taxes,* and capital levies or other similar taxes, *on aircraft of other contracting States engaged in international air transport . . .*" (emphasis supplied).

In further accordance with this resolution, the Department of State is reminded that each contracting State, including the United States, was to notify ICAO of the extent to which it was prepared to take action in accordance with the principles of this Resolution. In this regard, the United States specially and unequivocally represented to the other contracting States of ICAO that:

> "the United States in accord with the principles set forth in this clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this clause through bilateral agreements with other countries, or, in appropriate cases, by means of administrative rulings".

The United States' statement then declared that such agreements have been concluded today with several countries.

Thus, it is the opinion of the Government of the Netherlands that the United States has already committed itself to a practice of exempting aircraft under foreign flag and which are engaged in international air transportation from the levy of any property tax within the United States.

The Government of the Netherlands would also invite the Department of State's attention to the consideration of various policy factors which are necessarily germane to this issue. First, aircraft operating in international air transportation under the flag of the Netherlands are already subject to full taxation in the Netherlands. Thus, if a property tax were to be imposed by the United States or any individual State or political subdivision thereof, the aircraft would thus be doubly taxed. Such a tax burden is both unfair to the air transport enterprises involved and also a frustrating but preventable, impediment on the smooth development of trade and travel between our two countries. It is indeed the very purpose for which section iii of the ICAO Council Resolution of 14 November 1966 was formulated and approved.

Finally, it seems evident that the imposition of a property tax on the aircraft of non-US airlines operated to or from the United States of America in foreign commerce may lead to the taxation of aircraft of US airlines by foreign Governments and their local political subdivisions.

Once the United States abandons the principle of reciprocal exemption from property taxation of aircraft, there is little reason other Governments will have to refrain from imposing similar, retaliatory property taxes. No one stands to gain from such an escalation of trade barriers as would come about, least of all carriers of the United States which

may find themselves with aircraft subject to property tax in many foreign jurisdictions.

The Government of the Netherlands is deeply concerned with the possible international complications which could result if the State of California were to impose a property tax on foreign aircraft operated in foreign commerce. The Government of the Netherlands urges the Government of the United States to take immediate and appropriate action to prevent the imposition of a property tax on foreign-registered aircraft by the State of California in order to assure continued growth and development of trade and other relations between our two countries.

Washington D.C.
June 9, 1978

Exhibit O

The Embassy of New Zealand presents its compliments to the Department of State and has the honour to refer to the proposed amendment to the California tax regulations which would enable the State of California to levy a property tax on aircraft owned and operated by foreign airlines engaged in foreign commerce to and from the State of California.

Air New Zealand is designated by the Government of New Zealand to operate from New Zealand via certain intermediate points to Los Angeles, California, pursuant to the provisions of the 1964 New Zealand-United States Air Transport Agreement. Article 7 of that Agreement exempts, on the basis of reciprocity, essential support equipment from customs duties, excise taxes, inspection fees and other national duties or charges. The intent and spirit of this Article is "to prevent discriminatory practices and to assure equality of treatment . . ." and it is the belief of the New Zealand Government that the proposed tax is contrary to that spirit and intent. This would seem to be the view also of the United States Government when it advised ICAO of the extent to which it was prepared to take action in accordance with the principles of Section III of the ICAO Council resolution of 14 November 1966 on Taxation of the Income of International Air Transport Enterprises and on Taxation of Aircraft. That section *inter alia* urges contracting states to grant reciprocally, to the fullest extent "exemption from property taxes, and capital levies or other similar taxes on aircraft of other contracting states engaged in international air transport." The United States stated that it is "in accord with the principles set forth in this clause and, in accordance with its

existing laws, has for a long period of time followed the practice of granting the exceptions provided for in this clause through bilateral agreements with other countries . . ." The United States then included New Zealand in the list of countries with which it had concluded such agreements to grant the exemptions provided in Section III of this resolution, namely exemption *inter alia* of aircraft from property tax.

Furthermore, Article 24(A) of the Convention on International Civil Aviation 1944 specifically requires that aircraft of another contracting state "shall be admitted temporarily free of duty, subject to the customs regulations of the state". Both New Zealand and the United States are parties to the Convention and are bound to observe the obligations imposed by this Article regardless of whether local or national "duty" is involved. In New Zealand's view the word "duty" as used in Article 24(A) is sufficiently wide to cover the proposed property tax and the proviso relating to customs regulations refers only to administrative procedures such as "customs supervision" as is pointed out later on in the same paragraph. This view is confirmed by the 1966 Council resolution referred to above.

The New Zealand Government is concerned that if the State of California is permitted to impose the property tax on aircraft engaged in foreign commerce, the New Zealand Government will have no option but to consider taking appropriate action to ensure that its designated airline is not disadvantaged. The proposed action of the State of California could be responsible for a chain reaction that can only increase airline costs and inevitably lead to significant increases in the fares, rates, and charges for international travel by air between our two countries.

In view of all these considerations the New Zealand Government would appreciate clarification from the Government of the United States as to what action it proposes to take in respect of the property tax on foreign aircraft proposed by the State of California.

The Embassy of New Zealand avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

[Embassy Seal]

Embassy of New Zealand,
WASHINGTON, D.C.
19 June, 1978

Exhibit P

Note No. 153

Her Britannic Majesty's Embassy presents its compliments to the Department of State and has the honour to refer to a circular letter from the California State Board of Equalization dated 24 March 1978 which gives notice of a proposed amendment to the California Tax Regulations. This proposal is intended to enable the State of California and the local county assessors of California to levy property tax ("The Proposed Tax") on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Proposed Tax falls within the scope of Article 8(5) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning Air Services signed at Bermuda on 23 July 1977, as amended. The Proposed Tax would be a tax imposed by State and local authorities on aircraft operated in international air services by the designated airlines of the United Kingdom and it would not be based on the cost of any services provided. Her Majesty's Government therefore calls on the United States Government to use its best efforts to secure exemption from The Proposed Tax for the designated airlines of the United Kingdom.

In addition, Her Majesty's Government maintain that the imposition of The Proposed Tax would be in contravention of Article 24 of the Convention on International Civil Aviation (the "Chicago Convention") to which the Governments of the United Kingdom and the United States are parties.

Article 24 requires aircraft of other Contracting Parties to be admitted temporarily free of duty. This provision must be taken to include exemption from any form of taxation whether levied at the national or state level.

Her Majesty's Government would also draw to the attention of the United States Government to Section III of the ICAO Council Resolution of 14 November 1966 on taxation of the income of international air transport enterprises and the taxation of aircraft. Under Paragraph 1(B) of this Section Contracting States are required reciprocally to grant exemption from property taxes on aircraft of other Contracting States engaged in international air transport. The United States Government has represented to the other Contracting States of ICAO that it "has for a long period of time followed the practice of granting . . . through bilateral agreements with other countries or, in appropriate cases, by means of administrative rulings . . . the exemptions provided for" in this Section.

Her Majesty's Government is concerned that if the State of California is permitted to take this action other States may follow suit and that there may be proliferation within the United States of similar local taxes on their designated airlines. No comparable tax is imposed on aircraft of United States designated airlines by any authority within the United Kingdom. Imposition of The Proposed Tax would therefore alter the present position of reciprocity and would lead to an element of double taxation of United Kingdom designated airlines which would disturb the equilibrium of existing and proposed double taxation agreements between our two countries.

In the light of these considerations, Her Majesty's Government would be grateful if they could be informed of what action the United States Government is taking to prevent imposition of a property tax on foreign aircraft by the State of California.

The Embassy avails itself of this opportunity to renew the assurances of its highest consideration.

[SEAL]

BRITISH EMBASSY
WASHINGTON, D.C.

7 June 1978

Exhibit Q

DEPARTMENT OF JUSTICE
TAX DIVISION
104 State Office Building
Salem, Oregon 97320
Telephone: (803) 376-4494

January 31, 1978

Mr. Lindy Freeman
Division of Assessment & Taxation
Room 136
Multnomah County Courthouse
Portland, Oregon 97204

Re: Personal Property Tax on Cargo Containers

Dear Mr. Freeman:

This opinion is in response to a question presented by your office concerning cargo containers.

QUESTION PRESENTED

Are cargo containers used in interstate and foreign commerce subject to personal property ad valorem tax assessment?

ANSWER GIVEN

Cargo containers continuously present in Multnomah County are not constitutionally immune from an apportioned personal property ad valorem tax. Neither do these cargo containers qualify for exemption under Oregon's free port law, ORS 307.810.

DISCUSSION

You have asked whether cargo containers used on container ships in interstate and foreign commerce can be assessed under the personal property ad valorem tax. Taxpayers have claimed that these containers are either immune under the protection of the United States Constitution or are exempt under Oregon's free port law.

To support their position of constitutional immunity, taxpayers have cited a decision by the Superior Court of California. *Japan Line, Ltd.* v. *County of Los Angeles,* 132 Cal Rptr 531 (L.A. County 1973). However, the Supreme Court of California recently reversed their superior court's decision. *Japan Line, Ltd.* v. *County of Los Angeles,* 141 Cal 905 (1977). The California Supreme Court held that an apportioned ad valorem tax on the cargo containers violated neither the Commerce Clause, the Import-Export Clause nor the Supremacy Clause of the United States Constitution. A copy of this recent decision and a copy of an earlier decision in *Sea-Land Service, Inc.* v. *County of Alameda,* 117 Cal2d 448, 528 P2d 56 (1974) are enclosed. Assuming that the cargo containers' presence in Multnomah County are similar to those in the California counties, these two cases clearly indicate that the cargo containers are subject to the ad valorem tax.

The taxpayers also contend that their cargo containers are exempt from ad valorem taxation under the Oregon free port law. However, ORS 307.810 grants an exemption only for

> "Personal property in transit through this state [that] is goods, wares and merchandise destined for sale in the ordinary course of trade or business. . . ."

The cargo containers are used to transport personal property destined for sale in the ordinary course of the trade or business, but are not, themselves, destined for sale out of state. The Oregon free-port law was not intended to extend to containers used and reused transporting goods.

The two enclosed California decisions clearly hold that cargo containers used in interstate and foreign commerce are not immune under the United States Constitution from an apportioned ad valorem tax. In addition, the Oregon free port law does not extend its exemption protection to the containers. Consequently, the continuous presence of cargo containers in Multnomah County subjects them to an apportioned ad valorem tax.

Sincerely,

/s/ JAMES D. MANARY
James D. Manary
Assistant Attorney General

bem

cc: Walt Taylor
Personal Property Assessment

RECEIVED
MULTNOMAH COUNTY
FEB 02 1978
BRUCE G. LAWMAN
DIRECTOR, DIVISION OF
ASSESSMENT & TAXATION

Exhibit R

[Letterhead of the United States Department of State]

17 April 1978

Dear Governor Brown:

I am writing to express support for SS 1756, introduced by Senator Dills, to exempt foreign cargo containers principally used in the transportation of cargo by vessels in ocean commerce, from property taxation for the fiscal year 1979-80 and fiscal years thereafter. The Department of State is pleased to learn of the introduction of this bill and strongly recommends its passage.

Enactment of this bill would extend indefinitely the present exemption of such containers from property taxation. In response to past imposition of local property taxes upon such containers, foreign governments have expressed their concerns that containers owned by their citizens may be subjected to double taxation, i.e., taxation both in the home country and in California. For example, the Department recently received an aide-memoire from the Government of Japan complaining that local California property taxes upon foreign containers used in foreign commerce constitute a tax burden which impedes the smooth development of U.S.-Japan trade relations. Enactment of SB 1756 would preclude any renewal of such concerns on the part of foreign governments.

The proposed legislation would also lessen the likelihood of retaliatory taxation measures against U.S. citizens engaged in ocean commerce abroad by foreign governments which do not currently impose a property tax upon U.S. containers.

We believe the proposed legislation will foster the financial health and well-being of both U.S. and foreign vessels now operating to California. The legislation appears consistent with the principle of taxation based upon reciprocity. We hope it will receive early and favorable consideration.

Sincerely,

/s/ Julius L. Katz
Julius L. Katz
Assistant Secretary for
Economic and Business Affairs

cc: Senator Dills
Senator Marks
Senator Beverly
Senator Nejedly
Senator Rodda
Senator Stull

Assemblyman Cullen
Assemblyman Bane
Assemblyman Bannai
Assemblyman Boatwright
Assemblyman Chel
Assemblyman Imbrecht
Assemblyman Knox
Assemblyman Vincent Thomas

The Honorable
Jerry Brown,
Governor of California,
Sacramento.

Exhibit S

521st Council meeting

— Transport —

Luxembourg, 12 June 1978

President: Mr. Kjeld OLESEN

Minister for Public Works
of the Kingdom of Denmark

ACTIVITIES OF CERTAIN NON-MEMBER COUNTRIES IN THE FIELD OF MARITIME TRADE

In the light of difficulties observed as a result of the activity of certain third countries in the field of maritime trade the Council examined measures to be taken by the Community to counteract this trend. It recorded its agreement on a framework decision binding each Member State to take steps to set up a system by which to gather information on the activities of the fleets of countries whose practices are detrimental to the maritime interests of Member States, in particular insofar as these activities undermine the competitivity of Member States' fleets engaged in international maritime trade.

To attain these goals each Member State must be able to obtain information on the level of services offered, the nature, volume, value, origin and destination of goods loaded and unloaded and on the rates charged for these services.

The Council will decide on the countries to whose fleets the all-round Community system of information will apply.

On this point the Council instructed the Permanent Representatives Committee to work out in conjunction with the Commission measures for implementing these provisions,

for adoption by the Council at its next transport meeting in November, bearing in mind the wishes expressed by delegations as regards the activities of State-trading countries and flag of convenience countries.

On the basis of the information gathered, the Council will be able to decide suitable counter measures against offending countries. These will form part of national legislation, be applied in concert, and might include restrictions, depending on the circumstances.

One delegation gave its agreement subject to confirmation, and will make known its firm position at the earliest opportunity.